UNIVERSAL OIL PRODUCTS COMPANY,

Petitioner,

vs.

ROOT REFINING COMPANY and SKELLY OIL COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

RALPH S. HARRIS,
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JOHN R. McCULLOUGH,
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A. M. BYRD,
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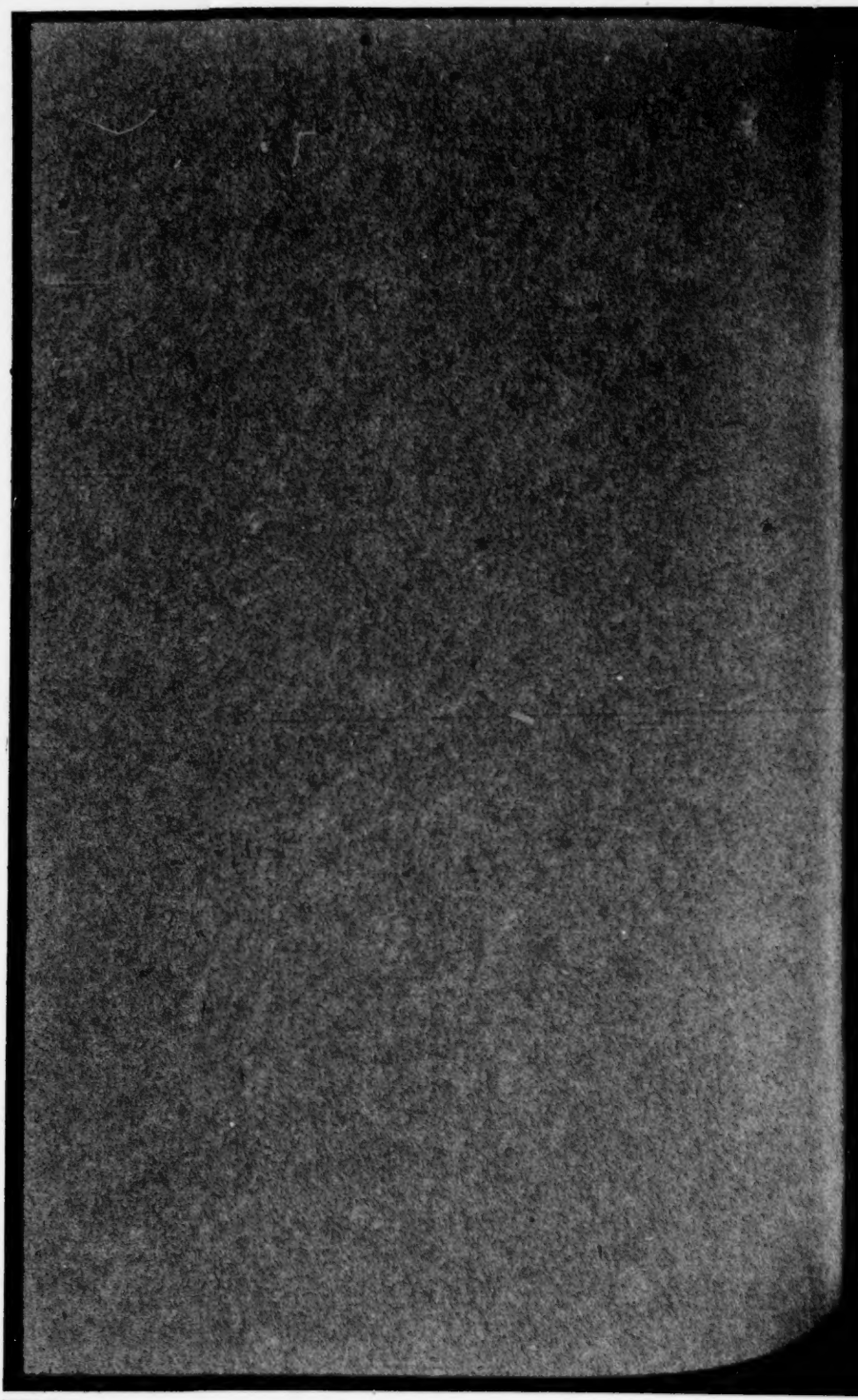
Dated: September 17, 1947.



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Orders Below

The orders of the Court of Appeals dated June 20, 1947, are set forth at pages 174-7, of the transcript of the record filed herewith.*

Jurisdiction

The facts supporting the jurisdiction of this Court are set forth in the petition.

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*References styled "R. " are to pages in the certified record accompanying this petition; references styled "v. , p. " are to pages of the certified record in cause numbered 48, October Term, 1945, incorporated by reference.

Cases believed to sustain the jurisdiction of this Court are as follows:

U. S. Alkali Assn. v. *U. S.*, 325 U. S. 196;
In re 620 Church St. Corp., 299 U. S. 24, 26;
Holiday v. *Johnston*, 313 U. S. 342, 348, n. 2;
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Union Pac. R. R. Co. v. *Weld County*, 247 U. S. 282;
Spiller v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

Statement of Facts

The facts are sufficiently set forth in the petition.

Specification of Errors

If the writs are granted, petitioner will urge that the Circuit Court of Appeals erred in the following respects:

1. In assuming jurisdiction to make and enter the orders dated June 20, 1947,* in a matter which did not constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States.

*Unless otherwise indicated, reference throughout this brief to the orders dated June 20, 1947, is a reference to those portions of the orders as to which review is sought, *viz.*, that requiring petitioner to show cause, "if any there be", why the judgments of affirmance in the *Root* case should not be vacated by reason of alleged fraud and that permitting Skelly Oil Company to intervene.

2. In assuming jurisdiction to make and enter the orders dated June 20, 1947, in a matter in which there were no adverse parties with legally cognizable adverse interests.

3. In assuming jurisdiction to make and enter the orders dated June 20, 1947, although the causes in which the orders were captioned had become entirely moot, for (a) they had been completely settled by agreement of the parties making provision for vacation of the judgments rendered therein and for dismissal of the bills; and (b) their subject matter had ceased to exist as one of the two patents involved had expired and the other had been held invalid by this Court.

4. In making and entering the orders dated June 20, 1947, captioned in the consolidated cause entitled *"Root Refining Company, Defendant-Appellant, vs. Universal Oil Products Company, Plaintiff-Appellee"*, directing your petitioner to show cause why the judgments of the Circuit Court of Appeals entered on June 26, 1935, should not be set aside and vacated for fraud practiced upon the court, thereby acting contrary to the requirements of due process of law.

5. In making and entering the orders dated June 20, 1947, captioned in the consolidated cause entitled *"Root Refining Company, Defendant-Appellant, vs. Universal Oil Products Company, Plaintiff-Appellee"*, granting Skelly Oil Company leave to intervene for the first time in the appellate court, although there was no case or controversy before the court and Skelly had not sought to intervene in the District Court, did not present any issue of law or fact in common with the *Root* case and presented no independent ground for federal jurisdiction.

6. In deviating from the mandate of this Court, dated July 11, 1946, by making and entering the orders dated June 20, 1947.

POINT I.

THE CIRCUIT COURT OF APPEALS, IN ASSUMING JURISDICTION TO MAKE AND ENTER THE ORDERS DATED JUNE 20, 1947, ACTED CONTRARY TO THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL.

The jurisdiction of the courts of the United States is limited by the Constitution to cases or controversies (Constitution, Article III, Section 2). The case or controversy must be actual. *Coffman* v. *Breeze Corporations,* 323 U. S. 316; *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; *Willing* v. *Chicago Auditorium,* 277 U. S. 274; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *New Jersey* v. *Sargent,* 269 U. S. 328; *Muskrat* v. *United States,* 219 U. S. 346; *Smith* v. *American Asiatic Underwriters, Federal,* 9 Cir., 127 F. (2d) 754. The powers of the court invoked must be strictly judicial in nature. *Muskrat* v. *United States,* 219 U. S. 346; *Lord* v. *Veazie,* 8 How. 251; *Osborn* v. *U. S. Bank,* 9 Wheat. 738. An absolute *sine qua non* of an actual controversy is the initial and continued existence of adverse parties asserting adverse interests. *Universal Oil Co.* v. *Root Rfg. Co.,* 328 U. S. 575; *Muskrat* v. *United States,* 219 U. S. 346; *South Spring Gold Co.* v. *Amador Gold Co.,* 145 U. S. 300; *Cleveland* v. *Chamberlain,* 1 Black 419; *Lord* v. *Veazie,* 8 How. 251; *O'Donnell* v. *United States,* 9 Cir., 91 F. (2d) 14. A party must assert a personal and private interest, as opposed to one asserted *pro bono publico. Liberty Warehouse Co.* v. *Gran-*

nis, 273 U. S. 70; *New Jersey* v. *Sargent,* 269 U. S. 328; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Fairchild* v. *Hughes,* 258 U. S. 126; *State of Georgia* v. *Stanton,* 6 Wall. 50; *Osborn* v. *U. S. Bank,* 9 Wheat. 738.

Judged by these principles, the portions of the orders of the Circuit Court of Appeals dated June 20, 1947, of which a review is sought, were not entered in a case or controversy within the meaning of the Constitution and, consequently, the Circuit Court of Appeals was without power to make or enter such portions of said orders.*

Although the orders dated June 20, 1947, were captioned in the *Root* case, no controversy had for years existed between Root and petitioner, the only parties thereto. Root had settled its controversy with petitioner by the settlement agreements of April 1, 1939, and July 28, 1944 (R. 161-73). Root declined to make itself a party or to permit itself to be made a party to the investigation although counsel for petitioner, prior to the entry of the order of the Circuit Court of Appeals dated June 15, 1944, in which the Circuit Court of Appeals purported to set aside the *Root* judgments, offered, if Root desired to be heard upon the question as a party, to preserve to Root the settlement and to consent to the setting aside of the judgments and the reargument of the appeals (see 328 U. S. at pp. 577-8).

Thus any controversy which may at one time have existed between Root and petitioner had become moot long

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*Of course, that portion of the orders which vacated the Court of Appeals' order of June 15, 1944, was within its power. A federal court, lacking any other jurisdiction, always has power, either on notice or *sua sponte* to vacate its judgments and dismiss actions for lack of jurisdiction. *M. C. & L. M. Railway Co.* v. *Swan,* 111 U. S. 379, 382; *Great Southern Fire Proof Hotel Co.* v. *Jones,* 177 U. S. 449, 453.

prior to the entry of the orders dated June 20, 1947. The Circuit Court of Appeals, therefore, was without power to make or enter those portions of the orders here sought to be reviewed. *St. Pierre* v. *United States,* 319 U. S. 41; *Alejandrino* v. *Quezon,* 271 U. S. 528; *Brownlow* v. *Schwartz,* 261 U. S. 216; *American Book Co.* v. *Kansas,* 193 U. S. 49; *Mills* v. *Green,* 159 U. S. 651.

It is clear from the pronouncements of this Court that where litigants at any stage of the proceedings settle their differences, the settlement agreement completely extinguishes the causes of action and any judgments entered thereon and the court is thereby rendered powerless to act thereafter, except to dismiss for lack of jurisdiction. *Dakota County* v. *Glidden,* 113 U. S. 222; *Buck's Stove &c. Co.* v. *Am. Fed. of Labor,* 219 U. S. 581; *Paradise Land & Livestock Co.* v. *Federal Land Bank, Etc.,* 10 Cir., 147 F. (2d) 594, *cert. den.* 326 U. S. 717; *Walling* v. *Shenandoah-Dives Mining Co.,* 10 Cir., 134 F. (2d) 395. *Cf. Smallwood* v. *Gallardo,* 275 U. S. 56; *Gallardo* v. *Santini Co.,* 275 U. S. 62; *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116.

Under the foregoing authorities the court below, in the absence of adversary parties and in the absence of a case or controversy, had no power to take any effective juridical action binding upon petitioner's property rights, whether by way of ordering petitioner to show cause why judgments which had been encompassed in the settlements should not be set aside for fraud or of permitting intervention.

But this does not mean that the Court of Appeals, even where no case or controversy exists, lacks the power "to unearth such a fraud" perpetrated against it and "to unearth it effectively" (328 U. S at p. 580).

The court may act effectively in a variety of ways. For example:

1. it may spread upon its record the testimony taken in the investigation and the report of its investigator;

2. it may approve such report and give publicity thereto;

3. it may commence disciplinary proceedings against officers of the court;

4. it may suggest or cause the commencement of contempt of court proceedings; and

5. it may make available to public prosecutor and private litigant alike the testimony and the report.

The foregoing, we respectfully submit, would constitute, even in the absence of a case or controversy, an effectual unearthing of fraud against the court, without doing violence to established principles of due process of law and should fully satisfy the strictest requirements of a court properly jealous of its honor. Under the circumstances here presented the investigation should surely not be given any greater effect than an indictment.

POINT II.

THE ORDERS OF JUNE 20, 1947, DIRECTING UNIVERSAL TO SHOW CAUSE WHY THE JUDGMENTS IN THE *ROOT* CASE SHOULD NOT BE VACATED FOR FRAUD ARE VOID BECAUSE THE CIRCUIT COURT OF APPEALS ACTED WITHOUT JURISDICTION AND DEPARTED COMPLETELY FROM THE REQUIREMENTS OF DUE PROCESS OF LAW.

(A) The court acted without jurisdiction.

Since the instant proceeding did not constitute a legally cognizable case or controversy, the Circuit Court of Ap-

peals was manifestly without power to make and enter the orders directing Universal to show cause why the *Root* judgments should not be vacated for fraud. The decisions of this Court heretofore referred to in Point I make it unnecessary to argue again the proposition that, absent a case or controversy within the meaning of the Constitution, a federal court is totally powerless to take any step such as that contemplated by the orders of the Circuit Court of Appeals.

Moreover, the Circuit Court of Appeals, in requiring petitioner to show cause why the judgments in the *Root* case should not be set aside for fraud, deviated from the mandate of this Court, dated July 11, 1946, which directed the Circuit Court of Appeals to enter a judgment in conformity with the opinion of this Court and commanded that such execution and proceedings be had in the cause, in conformity with the opinion and judgment of this Court, as according to right and justice ought to be had. This Court, in its opinion, held that petitioner's rights could not be adjudicated in the instant investigation, in which the usual safeguards of adversary proceedings were not observed. The Circuit Court of Appeals, in the continuing absence of an adversary proceeding, has once again purported to enter orders affecting Universal's property rights solely on the basis of the "investigation"; unless the investigation be deemed by the court below to be binding, at least *prima facie*, upon petitioner, it is inconceivable that the Court would undertake to compel petitioner to show cause why the judgments in the *Root* case should not be vacated for fraud. Indeed, it is plain from the stenographer's minutes of the hearing preceding the orders of June 20, 1947, that the intervenor and the court below both intended, by means of an order to show cause, to utilize the results of the "investi-

gation" not merely as a guide for the introduction of evidence or even as a sort of indictment against petitioner, but as *prima facie* proof of petitioner's guilt (R. 139-40, 144-5, 147-8). The action now complained of is, therefore, as improper as was the order of December 29, 1944, which was reviewed and condemned by this Court in its opinion of June 10, 1946.

(B) The orders of June 20, 1947, violate the concepts of due process of law.

This Court, in its previous decision (328 U. S. 575) condemned the action of the Circuit Court of Appeals designed to affect petitioner's property rights and judgments by means of an investigation in which petitioner did not have such opportunity to be heard as is accorded to parties in adversary proceedings. But the Circuit Court of Appeals, on the basis of the identical record condemned by this Court, has directed petitioner to show cause "if any there be" why the *Root* judgments should not be vacated for fraud. A court may not, without a hearing, merely upon the charge of a stranger, without any issues being framed in proper pleadings, and upon information not properly a part of the record, shoulder petitioner with the burden of proving itself innocent of the alleged fraud. The concept of due process, expressed in many opinions of this Court, condemns such practice. *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575; *Morgan* v. *United States*, 304 U. S. 1, 19; *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294; *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274; *Int. Com. Comm.* v. *Louis. & Nash. R.R.*, 227 U. S. 88; *Windsor* v. *McVeigh*, 93 U. S. 274. The procedure adopted by the Circuit Court of Appeals is so contrary to accepted

standards of judicial action as to constitute a deprivation of your petitioner's property without due process of law and to require, in the public interest, a review by this Court. We respectfully submit that the action taken by the Circuit Court of Appeals departs as completely from established modes of procedure governing litigation as did that of the lower court in *Windsor* v. *McVeigh,* 93 U. S. 274.

It should be noted that the orders here sought to be reviewed do not grant to petitioner the right to have the issue of its alleged fraud determined upon pleadings duly filed nor does it allow trial by jury, if necessary, of controverted issues of fact. On the contrary, the orders, for which review is sought, are summary orders to show cause, patently based upon the record heretofore made, requiring petitioner to prove its innocence although it has never been convicted in any judicially cognizable case or controversy pursuant to the requirements of due process of law. Furthermore, the orders deprive petitioner of its right to be heard on appeal, for they permit the Appellate Court in the first instance to determine the question at issue. Indeed, the orders demonstrate the danger of permitting a departure from established judicial procedure every time the cry of fraud is raised. It is particularly important to preserve the requirements of due process of law when the charge against a party is offensive in character. But the court below seems so overwhelmed by the charge of fraud upon it that it will not permit the matter to be determined by adversary litigation conducted according to constitutional requirements in a proper forum. Against such excess of judicial zeal, this Court should interpose its mandate before irreparable injury is done to the entire federal judicial system and petitioner is destroyed by a judicially sanctioned, but unestablished, stigma of fraud.

Petitioner most earnestly submits that until a controversy legally cognizable by the federal courts has been commenced, and until a trial of the issues therein has been conducted in accordance with the recognized principles of law governing such cases, it should not be subjected to a purported "adjudication" finding it guilty of fraud and thus seriously affecting its property rights. Cases involving millions of dollars of claimed damages are pending against petitioner as a result of the abortive "investigation" heretofore conducted by the court below. The plaintiffs in these cases are waiting hopefully for another "determination" of fraud against petitioner in further proceedings below wherein petitioner will not have the benefits of adversary procedure and due process of law. Such plaintiffs are not entitled to such advantage but should litigate the alleged fraud with petitioner pursuant to the requirements of due process of law. Petitioner is prepared to litigate any such proper case upon the merits in accordance with law and to be bound by the outcome thereof.

POINT III.

THE CIRCUIT COURT OF APPEALS, IN GRANTING LEAVE TO SKELLY OIL COMPANY TO INTERVENE, ACTED WITHOUT JURISDICTION AND IN A MANNER CONTRARY TO THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL.

During the investigation conducted by *amici curiae* and at the prior argument before this Court, *amici curiae* purported to act on behalf of Skelly Oil Company, among others. But these oil companies, including Skelly, "insisted

that they were neither formal nor substantial parties to the *Root* case" and they "did not subject themselves to the court's jurisdiction" either in that case or in the course of the investigation (see 328 U. S. at pp. 577-578). Not until Skelly was assured of the conclusion which the court below would reach in connection with the alleged fraud which was the subject matter of the investigation did it, at a very late date and long after the investigation had been completed, endeavor, by the petition which is one of the bases of the orders here complained of, to become a party which could take advantage of the conclusion which we contend was improperly reached by the court below.*

Irrespective of the inherent inequity of Skelly's position it is plain that as a matter of law the court below had no jurisdiction and no right to permit the intervention. The proceeding before the Court of Appeals has not changed in character since the previous decision by this Court (328 U. S. 575). When the order granting the petition for intervention was made, the Court of Appeals did not have before it an adversary proceeding between adverse parties asserting adverse interests. As we have shown in the first point of this brief, whatever causes of action and judgments thereon had originally existed between Root and petitioner, had been extinguished by the settlements and the causes had been rendered moot. In this state of the record there was no case or controversy in which the Court

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*Even if there were a case or controversy here involved, the intervention permitted below at this late date is contrary to the weight of authority. *Roberts* v. *Metropolitan Life Ins. Co.*, 7 Cir., 94 F. (2d) 277, 281; *American Brake Shoe & F. Co.* v. *Interborough R. Tr. Co.*, 2 Cir., 112 F. (2d) 669; *Baltimore Trust Co.* v. *Interocean Oil Co.*, D. Md., 30 F. Supp. 484, 485; *The American Eagle*, D. Del., 28 F. (2d) 1000, 1001.

of Appeals could permit Skelly Oil Company to intervene.* Since the existence of a case or controversy is a prerequisite to intervention, the Court of Appeals had no jurisdiction to make and enter the orders granting leave to intervene. *Kendrick* v. *Kendrick*, 5 Cir., 16 F. (2d) 744, 745, *cert. den.* 273 U. S. 758; *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, D. N. J., 46 F. Supp. 346, 347; *Haase* v. *Haase*, 261 Ill. 30, 32, 103 N. E. 628.

But it would appear that the Court of Appeals, in granting Skelly Oil Company leave to intervene, has sought to cure this fundamental jurisdictional defect in this proceeding by permiting Skelly to "lift itself by its own bootstraps". One seeking to intervene must, at the time of his petition, have a legal interest in an existing case or controversy. Lacking an existing case or controversy, the Court of Appeals has, in effect, attempted to create such a case or controversy by permitting Skelly Oil Company to intervene on the ground that it had an interest. The obvious defect in the reasoning is, of course, that any interest which Skelly Oil Company could possibly have **had** was not in any preexisting case or controversy but in the case or controversy which the Court purported to create for the first time on the basis of Skelly Oil Company's alleged claim of right to intervene. To put it another way, prior to the intervention of Skelly there was no "fraud issue" in the *Root* case; there were no pleadings and, accordingly, no issue on the question of fraud. The pleadings in the *Root*

*Surely, Skelly Oil Company would not presume to contend that it seeks to intervene in a controversy between petitioner and the Circuit Court of Appeals for the Third Circuit, or the Judges thereof. A controversy of that nature, with one of the parties in the dual role of prosecutor and judge, would violate the most fundamental principles of American jurisprudence.

case dealing exclusively with the Dubbs and Egloff patents had no relationship whatever to the issues in the case in which Skelly Oil Company was interested for its litigation in the Delaware District Court dealt with an entirely different patent (R. 37-43). Skelly Oil Company interjected the issue of alleged fraud in obtaining the *Root* judgments into the Skelly patent litigation by a plea of unclean hands (although entirely different patents were involved) and then was permitted to justify its intervention in the *Root* case on the theory that the intervention in that case injected the same issue therein.

If Skelly may only intervene with respect to an existing issue, how can it be permitted to intervene for the purpose of creating such an issue?

In any event, even if it be assumed, *arguendo,* that the intervention of Skelly Oil Company could create a case or controversy, it is clear that such case or controversy would be a proceeding separate and distinct from any between the original parties to the *Root* case. Such an independent controversy between Skelly Oil Company and petitioner involving whether or not fraud was committed in the *Root* case and the consequences thereof, may not be litigated in a federal court in the absence of diversity of citizenship or some other ground of federal jurisdiction. No such diversity of citizenship would exist in that controversy for both Skelly Oil Company and petitioner are Delaware corporations (R. 32; v. I, p. 115) and no other federal jurisdictional ground has been suggested. The granting of the petition for leave to intervene would, therefore, automatically divest the Circuit Court of Appeals of jurisdiction, even if it be assumed that it otherwise had such jurisdiction. *Cochrane v. W. F. Potts Son & Co.*, 5 Cir., 47 F. (2d) 1026; 2 Moore,

Federal Practice, p. 2333. *Cf. Fulton Bank* v. *Hozier*, 267 U. S. 276.

In addition, the orders granting leave to intervene are contrary to the rule, obtaining in many other Circuit Courts of Appeal, that intervention will not be permitted for the first time in an appellate court. *Wenborne-Karpen Dryer Co.* v. *Cutler Dry Kiln Co.*, 2 Cir., 292 Fed. 861; *Veitia* v. *Fortuna Estates*, 1 Cir., 240 Fed. 256; *Morin* v. *City of Stuart*, 5 Cir., 112 F. (2d) 585. See *Smith* v. *American Asiatic Underwriters*, 9 Cir., 134 F. (2d) 233, 236. *Cf. United States* v. *Patterson*, 15 How. 10.

Conclusion

For the foregoing reasons, it is submitted that the petition should be allowed and that the portions of the orders dated June 20, 1947, herein complained of, entered by the Circuit Court of Appeals for the Third Circuit, should be reviewed and reversed.

Respectfully submitted,

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MC CULLOUGH,
FREDERICK W. P. LORENZEN,
A. M. BYRD,
Of Counsel.

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Respondents.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes UNIVERSAL OIL PRODUCTS COMPANY, by Ralph S. Harris, its attorney, and respectfully moves this Honorable Court for leave to file the petition for writs of *certiorari*, hereto annexed, under Section 262 of the Judicial Code (28 U. S. C. § 377), directed to the United States Circuit Court of Appeals for the Third Circuit to review certain portions of two orders of the said Circuit Court of Appeals, entered June 20, 1947, and more particularly described in said petition, and for such other and further relief as to the Court may seem just and proper.

Dated: September 18, 1947.

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
FREDERICK W. P. LORENZEN,
A. M. BYRD,
Of Counsel.

IN THE

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OCTOBER TERM, 1947

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY and
SKELLY OIL COMPANY,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Universal Oil Products Company, prays that writs of *certiorari* issue to the United States Circuit Court of Appeals for the Third Circuit to review those portions of two orders of said Circuit Court of Appeals, entered on June 20, 1947, in an investigation (conducted by it and under its auspices, at the behest of certain attorneys termed *"amici curiae"*), captioned in causes in said court entitled "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-

Appellee", Nos. 5648 and 5546, which (a) directed your petitioner to show cause before said Circuit Court of Appeals on October 13, 1947, why the judgments of that court entered in the said cause entitled "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee" on June 26, 1935, should not be set aside and vacated by reason of alleged fraud and corruption practiced upon the said Circuit Court of Appeals by your petitioner or those acting upon its behalf, and (b) granted the petition of Skelly Oil Company to intervene "to participate in any further proceedings in this Court or in the district court on the question whether there should be a dismissal for fraud".

A certified transcript of the record is furnished herewith in compliance with Rule 38 of this Court.*

Jurisdictional Statement

The orders, portions of which are sought to be reviewed, were entered on June 20, 1947 (R. 174-7),** and the jurisdiction of the Court of Appeals herein questioned was assumed on June 20, 1947, and has continued to the present time.

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*Petitioner is filing with this petition a certified transcript of the record in these proceedings since December 29, 1944 (the last date reviewed by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575) and is simultaneously seeking leave of this Court to incorporate by reference the certified record in *Universal Oil Co.* v. *Root Rfg. Co., supra.*

**References styled "R. " are to pages in the certified record accompanying this petition; references styled "v. , p. " are to pages of the certified record in cause numbered 48, October Term, 1945, incorporated by reference.

Jurisdiction of this Court is invoked under Section 262 of the Judicial Code (28 U. S. C. § 377).* Grant of the common law writ of *certiorari*, as authorized by Section 262 of the Judicial Code, is sought to correct a continuing excess of jurisdiction by the Court of Appeals and in furtherance of justice in a question of public importance. See *U. S. Alkali Assn.* v. *U. S.*, 325 U. S. 196; *In re 620 Church St. Corp.*, 299 U. S. 24, 26; *Holiday* v. *Johnston*, 313 U. S. 342, 348, n. 2; *In re Chetwood, Petitioner*, 165 U. S. 443, 462; *McClellan* v. *Carland*, 217 U. S. 268; *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117.

Summary and Short Statement of Matter Involved

The portions of the two orders now sought to be reviewed represent the latest steps taken by the court below to place the stigma of fraud upon your petitioner without a trial in a justiciable case or controversy under the Constitution, conducted according to the requirements of due process of law. The earlier steps taken by the Court of Appeals resulted in a reversal by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575. This Court's criticism of the earlier proceedings below applies with equal force to the portions of the orders now sought to be reviewed. Indeed, your petitioner is informed and believes

*Petitioner has filed simultaneously herewith a motion for leave to file a petition for writs of prohibition and mandamus, in which it invokes the jurisdiction of this Court under Section 262 of the Judicial Code (28 U. S. C. § 377), and a petition for writ of *certiorari*, in which it invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. § 347).

that the further steps embodied in the orders of the Court of Appeals deviate from this Court's mandate following the determination of the previous review.

Your petitioner is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business at 310 South Michigan Avenue, Chicago 4, Illinois.

The Circuit Court of Appeals for the Third Circuit, as will hereinafter more fully appear, has purported to assume jurisdiction and to take certain action and has entered certain orders, portions of which were wholly beyond the powers and authority of said court.

The action taken, jurisdiction assumed and the orders entered purport to be in causes heard and determined on appeal by the Court of Appeals in 1935 and entitled in that court "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee", Nos. 5648 and 5546 (said causes being hereinafter sometimes referred to as the "*Root* case"). Actually the Court of Appeals has assumed jurisdiction and taken action in an investigation in which, petitioner is advised, the Court of Appeals is without jurisdiction to deprive petitioner of its property.

In 1939, after the determination of the appeal in the *Root* case, petitioner and Root Refining Company (the only parties to the *Root* case) fully settled their controversy and the case became wholly moot (R. 161).

Thereafter, in 1941, certain attorneys, namely, Arthur C. Denison, J. Bernhard Thiess, Thorley von Holst and Arthur G. Logan, Esqs., appeared before the Court of Appeals for the Third Circuit and suggested an investigation by the court of the relationship, if any, between petitioner,

Circuit Judge J. Warren Davis and an attorney by the name of Morgan S. Kaufman.

None of these attorneys was a party to or appeared as attorney for or representative of any party to the *Root* case. The defendant Root Refining Company signified its unwillingness to appear or to be made in any wise a party to the investigation suggested by the aforesaid attorneys.

The Court of Appeals suggested that, in the absence of parties, said attorneys appear as *amici curiae*, which was done. Subsequently, the Court of Appeals ordered that an investigation, as suggested by these attorneys, be conducted by a master appointed by it; the investigation was held; a report and findings of fraud were submitted by the master to the Court of Appeals; said findings were approved and adopted by the Court of Appeals which, on June 15, 1944, entered an order setting aside the judgments of affirmance in the *Root* case. All this action was taken despite the fact that there were no formal pleadings,* no issues and no adversary parties before the court and despite the protest of your petitioner that no case or controversy under the Constitution existed and that no juridical action affecting its property could be taken in the premises (v. I, p. 121-4). Indeed, the master, before whom the hearings were held, construed the entire matter as a mere investigation, privately informed himself of certain facts, only some of which were made available to your petitioner, conducted the investigation informally and without strict regard to the rules of evidence and without affording your petitioner "the usual safeguards of adversary proceedings."

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*Other than a petition by *amici curiae* and various other documents which, we submit, did not serve the purpose of formal pleadings (v. I, p. 29-54, 55-60, 61-76, 77-89, 90-3).

On July 28, 1944, your petitioner and Root Refining Company entered into a further settlement agreement which provided, *inter alia*, that the decree of the district court in the *Root* case be vacated, that the bills of complaint filed therein be dismissed and that either party might cause an order to be entered or do any other necessary or advisable thing to effectuate the foregoing without further notice to the other (R. 170).

Subsequent to the entry of its order of June 15, 1944, setting aside the judgments of affirmance in the *Root* case for fraud, the Court of Appeals entertained an application on behalf of the two remaining *amici curiae* (one of the others having died in 1942 and the other having ceased to participate in the same year) and, under date of December 29, 1944, entered an order granting them compensation and reimbursement for their expenses as well as for the fees and expenses of the master. The Court of Appeals directed that all of these amounts be taxed against your petitioner (v. IX, p. 3692-3).

Said order of December 29, 1944, was brought to this Court by writ of *certiorari* and, after a review of the action taken by the Court of Appeals up to that date, was reversed (328 U. S. 575).*

In furtherance of said investigation undertaken by the Court of Appeals in 1941 and, petitioner is advised, partly in conflict with the aforesaid decision of this Court, *supra*, two identical orders were entered by the Court of Appeals under date of June 20, 1947 in the *Root* case, portions of which orders are now sought to be reviewed by this Court.

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*Except that this Court did not disturb the direction that petitioner pay the master's fees and expenses on account of petitioner's "acquiescing knowledge" that these would be assessed by the court. This sum petitioner has cheerfully paid.

By said orders, the Court of Appeals has directed as follows (though not in the following sequence [R. 174-7]):

(a) that its order of June 15, 1944 (which, following the investigation, set aside the judgments of affirmance in the *Root* case) be vacated;

(b) that your petitioner show cause, if any there be, before the Court of Appeals on October 13, 1947, why the judgments of affirmance in the *Root* case should not be set aside and vacated "by reason of alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf";

(c) that Skelly Oil Company (which had never been a party to the *Root* case or interested in any of the original issues thereof) be permitted to intervene as prayed, *i.e.*, "to participate in any further proceedings in this Court [Court of Appeal] or in the district court on the question whether there should be a dismissal for fraud"; and

(d) that the Attorney General be permitted to appear as *amicus curiae*.

It is with respect to subdivisions (b) and (c) above that petitioner now seeks a review by this Court.

The following is a brief chronology of events occurring in the investigation from the date of the previous review thereof by this Court (328 U. S. 575):

The opinion of this Court, *supra*, dealt with steps taken in the investigation up to December 29, 1944. Under date of June 20, 1946, the Court of Appeals, through its clerk, invited the suggestions of your petitioner and of *amici curiae* as to "the present status of the appeals" in the *Root*

case "now that the petitions for writ of certiorari have been disposed of by the Supreme Court" (R. 3).

In response thereto, *amici curiae* urged that this Court had not, by its decision, touched the order of the Court of Appeals of June 15, 1944, vacating and setting aside the *Root* judgments (R. 5-6).

On its part, petitioner submitted its interpretation of the decision of this Court. Petitioner urged that this Court had found that the order appealed from and reversed (namely, the order of the Court of Appeals of December 29, 1944, allowing compensation, fees and expenses) depended for its validity upon the validity of the order upon which it was predicated, namely, the order of the Court of Appeals of June 15, 1944, setting aside the *Root* judgments (R. 7-11).

Petitioner further submitted that in strict conformity with the findings of this Court, the order of June 15, 1944, was a legal nullity and should be stricken from the record, but that, even though there were no adversary parties, petitioner would consent that such order be resettled to provide for the setting aside of the *Root* judgments upon its consent and the dismissal of the appeals as moot (R. 10-11). It based its contention upon the following: (a) the settlement agreements between Root and petitioner, under the latter of which it was agreed that the decree of the district court be vacated and that the bills of complaint be dismissed (thus establishing that Root had no possible interest in further proceedings) and (b) the fact that none of the other oil companies, sued in other courts by petitioner for infringement of the same patents, could have a further interest for two reasons: (1) the cases in which pleas of *res adjudicata* had been set up by petitioner against the other

oil companies had all been dismissed; and (2) the patents involved in all of the cases no longer had any materiality to anyone, since the Dubbs patent had expired in 1938 (and the statute of limitation therefore barred further actions thereon) and the Egloff patent had been held invalid by this Court (*Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471).

Whilst this Court was considering a motion for rehearing upon its determination in 328 U. S. 575, *amici curiae* filed with this Court a supplement to their petition, in which they urged as a "cogent reason for granting the petition for rehearing" the above referred to contentions made by petitioner in response to the request of the Court of Appeals.

The petition for rehearing was denied by this Court on October 14, 1946 (329 U. S. 823).

Following the denial of said petition for a rehearing, *amici curiae* submitted to the Court of Appeals, through its clerk, on October 16, 1946, their further suggestions as to procedure. In that regard, *amici curiae*, while maintaining that the Court of Appeals had authority to send down its mandate to the district court "dismissing the bill of complaint for unclean hands", suggested as an alternative that petitioner be afforded "an opportunity to have whatever it is that it contends it did not have before". *Amici curiae* stated that it would be appropriate for the Court of Appeals to issue an order "directed to Universal *and based on the whole record in the case,** to show cause why this Court should not enter a mandate directing a final decree dismissing the action because of fraud on the part of the plain-

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*This record is the informal one made before the master and condemned by this Court as not affording the "usual safeguards of adversary proceedings" (328 U. S. 575, 580).

tiff".* As indicated by their letter, it was their suggestion that, upon the return day of the order, petitioner be given the opportunity to bring before the court any evidence in its possession opposing the rule and to raise any question of the competency of any evidence in the previous record. *Amici curiae* also conceded that petitioner be given the opportunity to examine the files which the master had, prior to the hearings commenced in 1942, himself personally examined (R. 13-16).

It is perfectly clear that the suggestions of *amici curiae,* which subsequent events demonstrate, petitioner submits, have been adopted by the Court of Appeals in its orders now sought to be reviewed, contemplated that the old record, which this Court has found to have been made in violation of the constitutional rights of petitioner, should be made the basis of further hearings and that petitioner should merely be allowed to interpose objections or supplements to this informal record.

Under date of October 18, 1946, in response to the aforesaid letter from *amici curiae,* petitioner's counsel wrote the Court of Appeals, through its clerk, restating its interpretation of the opinion of this Court and answering the suggestions of *amici curiae* above outlined.

Petitioner contended that this Court did hold that the order of June 15, 1944, in so far as it should be deemed to affect the property or rights of petitioner, denied petitioner due process of law and was not entered in an adversary proceeding, quoting from the opinion of this Court that the "difficulty [of *amici*] was to the fact that * * * Root had settled its controversy with Universal and was unwill-

*Italics supplied throughout unless otherwise indicated.

ing to disturb the agreement by an attempt to reopen the lawsuit", that "The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case" and that the moving attorneys "could not move on their behalf to have the *Root* decree vacated * * *" (R. 19).

Petitioner further pointed out to the Court of Appeals that the procedure suggested by ***amici curiae*** would

> "fly precisely in the face of the holding of the Supreme Court. There would still be no adversary parties before the Court and, consequently, no judgment affecting the rights and property of Universal could be entered. Furthermore, due process having been denied in the making of the record, that omission could not be cured by permitting Universal to present objections to bits of the record already made or to offer supplements thereto while leaving the record already made otherwise intact. The very vice which the Supreme Court pointed out would thus be perpetuated" (R. 19).

In summation of its position and the *raison d'etre* for its opposition to further harassment in this investigation, petitioner stated:

> "Only in a true adversary proceeding where a record is made in a court of competent jurisdiction in conformity with 'the usual safeguards of adversary proceedings' can that issue be determined against Universal or its property or rights.
>
> "It is respectfully suggested that the request by Amici for further consideration by this Court is merely another endeavor to utilize this Court as an instrument for the private gain of the private clients of Amici. After the entry of the order of December 29, 1944 and prior to the decision of the United

States Supreme Court in this matter, Amici, as attorneys for private interests (as well as Arthur Logan of the Delaware Bar who claims to be one of them) commenced litigation against Universal Oil Products Company in Illinois, Delaware and New York. The aggregate damages claimed in these actions are several million dollars. In each of the actions the alleged fraud of Universal in connection with the *Root* case is made the cornerstone or one of the cornerstones for plaintiffs' alleged right of recovery. In view of the Supreme Court decision it is apparent that plaintiffs in these actions, in order to succeed, must there establish the fraud which they allege. Amici as attorneys for private interests should be left to the plenary suits already instituted and Universal should be permitted there in litigation conducted according to the requirements of due process of law to endeavor to vindicate its integrity"* (R. 19-20).

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*In addition to the foregoing, Skelly Oil Company, a Delaware corporation, is the defendant in an action commenced in the District Court of Delaware for infringement of an entirely different patent. Judgment went for plaintiff in the latter court and was affirmed on appeal. Since about the year 1927, the accounting has been going on in that case. After the Court of Appeals had entered its order of June 15, 1944, setting aside the *Root* judgments, Skelly proposed to interpose in its case a defense of unclean hands, vitiating Universal's entire recovery and subjecting it to all of the expenses of Skelly Oil Company, said to involve hundreds of thousands of dollars. All this in spite of the fact that no claim has ever been advanced by Skelly that the judgments of the district court and of the Court of Appeals in that case, involving an entirely different patent from those involved in the *Root* case, are other than impeccable and unimpeachable.

In addition to the foregoing, another suit has been commenced in the state court in Delaware against petitioner claiming several hundred thousand dollars damages and predicated upon the alleged fraudulent nature of the *Root* judgments. Finally and more recently, a claim has been made in a Texas court which, if successful, would also involve petitioner in substantial damages.

In October, 1946, Skelly Oil Company (being the same company referred to in the footnote below) filed a petition with the Court of Appeals for leave to intervene in the *Root* matter "within the limits of the proposed pleading annexed hereto, to participate in any further proceedings in this Court or in the district court on the question whether there should be a dismissal for fraud" (R. 23). None of the allegations of the proposed pleading is directed toward any facts or issues in the patent litigation in the *Root* case, but all relate to further proceedings in the investigation, which was initiated in 1941 in the Court of Appeals by *amici curiae,* and are claimed to be material only with respect to the issues of fraud raised by Skelly Oil Company in the above-mentioned suits pending in Illinois and in the District Court of Delaware.

By order dated November 16, 1946, the Court of Appeals directed that a hearing be held on December 19, 1946, at which time argument would be heard "as to the grounds asserted for dismissal of the suits [the *Root* case]", and granted leave to Skelly Oil Company to be heard in support of its petition for leave to intervene (R. 46).

On December 19, 1946, the hearing was conducted by the Court of Appeals, the entire court, with the exception of one judge, sitting *en banc* (R. 49).

At that hearing petitioner moved the Court of Appeals, upon all of the proceedings theretofore had and upon the aforementioned settlement agreements between it and Root, for an order vacating its order of June 15, 1944 (which set aside the *Root* judgments), and presented to the court a proposed order providing, in addition, that, upon consent of your petitioner, the *Root* judgments be vacated, the mandates of the Court of Appeals, issued on October 30, 1935,

be recalled, the appeals be dismissed, and the causes remanded to the district court with directions to dismiss the bills of complaint pursuant to the stipulation of the parties upon the ground that the causes were moot.

Amici curiae, in their argument as to further steps to be taken, urged the same grounds contained in their letters, above summarized, to the clerk of the Court of Appeals. (For complete copies of these letters, see R. 5-6, 13-16, 50-76, 124-30).

Your petitioner opposed the petition of Skelly Oil Company for leave to intervene on several grounds: (a) that since the "investigation" was not a case or controversy within the court's jurisdiction, the intervention was improper; (b) that since both proposed intervenor and petitioner were Delaware corporations and no other independent ground for federal jurisdiction existed, permissive intervention was impossible; (c) that since intervention had not been sought in the district court, it was improper for the first time in the Court of Appeals; and (d) that intervention was not timely since it was sought many years after the *Root* case had been concluded and settled and long after the initiation and disposition of the "investigation".

In its petition for leave to intervene, Skelly Oil Company summarized the three procedures submitted to the Court of Appeals for determining its final disposition of the *Root* matter: (a) "a dismissal of the appeals on the ground that they are moot, as suggested on Universal's part"; (b) "according to one of the suggestions of *Amici*, a dismissal for fraud on the basis alone of the present record and this Court's Order of June 15, 1944" and (c) "a further hearing, either in this Court or on remand, under a show cause order which, as we understand it, would treat the

present evidence as creating at the least a *prima facie* case of fraud and would provide that a final disposition should not be made until after Universal has had an opportunity to rebut that *prima facie* case and overcome what it alleges were deficiencies of due process or regular trial procedure" (R. 24-5).

In the briefs and oral argument of counsel for Skelly Oil Company, the three foregoing propositions were submitted to the court.

It is perfectly clear from the minutes of the hearing (R. 139-40, 144-5, 147-8) that the order to show cause procedure, as contemplated both by the court and by the attorney for Skelly Oil Company, was to be one based upon the existing record made before the master, plus such additional evidence as petitioner should submit and subject to objections to evidence on the part of petitioner, with the clear understanding that, as counsel for Skelly Oil Company phrases it, "it is an order to show cause, which sort of puts the burden on the person ordered to show cause" (R. 140).

It was in the light of this hearing and with this background that the Court of Appeals on June 20, 1947, entered the orders, portions of which are now sought to be reviewed, in which it required petitioner to show cause why the *Root* judgments should not be set aside for fraud and granted leave to Skelly Oil Company to intervene. It is abundantly clear from the context that the Court of Appeals proposes on October 13, 1947, to take the record heretofore made, which has been condemned by this Court as not protecting the constitutional rights of petitioner, and to place upon petitioner the burden of proving that it is not guilty of fraud.

On July 30, 1947, a formal withdrawal of appearance as *amici curiae* by Messrs. Thiess and von Holst* was filed with the Clerk of the Court of Appeals, with the approval of that court (R. 178-9).

Appearance in the *Root* case in the Court of Appeals for the United States of America, *amicus curiae*, has been filed by an Assistant Attorney General and two Special Assistants to the Attorney General (R. 180-1).

Petitioner has never conceded that it was directly or indirectly a party to any fraud upon the Court of Appeals. Indeed, it has denied and will continue to deny any such charge. Nor has it sought by any legal technicality to be relieved of the just penalty for any fraud since, as it is advised, it has not been found guilty thereof by due process of law. Its efforts are directed toward preventing those suing elsewhere from acquiring a short-cut proof of alleged fraud by means of a summary and *ex parte* proceeding, in clear excess of the court's jurisdiction and without due process of law, and toward meeting the issue of fraud head-on in one or more of the several justiciable controversies involving the fraud issue now pending against it in courts of competent jurisdiction.

Indeed your petitioner believes that in a legally constituted proceeding, where the ordinary rules of evidence were observed, where an atmosphere of hostility were lacking, and where the party charging fraud were obliged to prove that charge by a fair preponderance of the evidence and, above all, where the trier of the facts would not have access to sources of information denied to your petitioner,—no finding of fraud or corruption touching your petitioner could be made.

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*Of the other *amici curiae*, Judge Denison died in May, 1942, and Mr. Logan has not been heard from since May 12, 1942.

Your petitioner respectfully submits that it is entitled, before the odium of corrupting the judiciary and all the concomitants thereof (such as charges in other proceedings of unclean hands) attach to it, to have a plenary trial of the issues in accordance with established legal principles. It has not had such a trial to date and has no possibility of obtaining one under the orders sought to be reviewed.

Questions Presented

1. Did the Circuit Court of Appeals have jurisdiction to enter those portions of the orders of June 20, 1947, which are sought to be reviewed?

2. In view of the settlement by the parties to the *Root* case, was there a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States before the Circuit Court of Appeals at the time of the making of the orders of June 20, 1947?

3. In view of the fact that there were not before the court adverse parties asserting adverse legally cognizable interests, was there a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States before the Circuit Court of Appeals at the time of the making of the orders of June 20, 1947?

4. Do those portions of the orders of June 20, 1947, which require petitioner to show cause why the judgments of affirmance in the *Root* case should not be vacated for fraud deprive the petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

5. Do the portions, or any of them, of the orders of which review is sought deviate from the mandate of this Court in the above-entitled causes sent down under date of July 11, 1946?

6. Did the Circuit Court of Appeals err, as a matter of Constitutional as well as statutory and common law, in granting the application of Skelly for leave to intervene?

Reasons Relied On for the Allowance of These Writs

Exercise of the power of this Court to grant the writs of *certiorari* herein prayed for is sought upon the following grounds:

1. The Circuit Court of Appeals, in assuming jurisdiction to make the portions of the orders here sought to be reviewed, did so in a matter which did not constitute a case or controversy and, accordingly, acted in a manner which is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

2. The Circuit Court of Appeals, in assuming jurisdiction to make the portions of the orders here sought to be reviewed, did so in a matter in which there were no adverse parties asserting adverse, legally cognizable, interests and in so doing acted in a manner which is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

3. The Circuit Court of Appeals, in assuming jurisdiction to make the portions of the orders here sought to be reviewed, purported to do so in cases which had become en-

tirely moot, for (a) those cases had been completely settled by agreement of the parties making provision for vacation of the judgments rendered therein and for dismissal of the bills; and (b) their subject matter had ceased to exist as one of the two patents involved had expired and the other had been held invalid by this Court; and in so doing the court below acted in a manner which is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

4. The Circuit Court of Appeals was wholly devoid of any jurisdiction or power to (a) direct petitioner to show cause why the judgments of the Circuit Court of Appeals in the *Root* case, entered June 26, 1935, should not be vacated and set aside for fraud or (b) grant Skelly leave to intervene, and the action of the said Court of Appeals in entering said orders to that effect is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

5. The action of the Circuit Court of Appeals, in making that portion of the orders requiring petitioner to show cause why the judgments of affirmance in the *Root* case should not be set aside for fraud, deprived petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States and is in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

6. The question of whether the Circuit Court of Appeals had jurisdiction to make the portions of the orders here sought to be reviewed involves important questions of

federal judicial administration and should therefore be resolved by this Court.

7. The action of the Circuit Court of Appeals in making those portions of the orders here sought to be reviewed constituted a deviation by that court from the mandates of this Court handed down under date of July 11, 1946, and such deviation is untenable and in conflict with the applicable decisions of this Court and of other Circuit Courts of Appeal.

8. The action of the Circuit Court of Appeals in making that portion of the orders granting leave to Skelly to intervene is, as a matter of Constitutional as well as statutory and common law, untenable and in conflict with the applicable decisions of other Circuit Courts of Appeal.

WHEREFORE, your petitioner respectfully prays that writs of *certiorari* be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Third Circuit commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all of the proceedings in the investigation conducted in the consolidated cause numbered and entitled in its Docket Nos. 5648 and 5546, Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee, since December 29, 1944 (the last date reviewed by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575), and that those portions of the orders of the Circuit Court of Appeals for the Third Circuit of which review is hereby sought may be reversed by this Court and that your petitioner have such other and further

relief in the premises as to this Court may seem just; and your petitioner will ever pray.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner.

By: GEORGE A. BOCKMAN,
Assistant Treasurer

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
FREDERICK W. P. LORENZEN,
A. M. BYRD,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

GEORGE A. BOCKMAN, being duly sworn, deposes and says: that he is Assistant Treasurer of Universal Oil Products Company, the petitioner named in the foregoing petition; that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief.

(Signed) GEORGE A. BOCKMAN

Sworn to before me this
17th day of September, 1947.

CATHERINE F. O'KEEFE
Notary Public in the State of New York
Residing in Bronx County
Bronx Co. Clk's No. 22 Reg. No. 90-O-9
N. Y. Co. Clk's No. 281 Reg. No. 257-O-9
Kings Co. Clk's No. 12 Reg. No. 158-O-9
Q'ns Co. Clk's No. 2437 Reg. No. 129-O-9
Richmond Co. Clk's No. 3-O
Cert. Filed in Westchester Co.
Nassau Co. Clk's No. 9-O-49
Commission Expires March 30, 1949

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 5648, 5546 October Term, 1943

UNIVERSAL OIL PRODUCTS COMPANY

v.

ROOT REFINING COMPANY

Appellant

ORDER

Present:

BIGGS, MARIS, JONES, GOODRICH, MCLAUGHLIN,

Circuit Judges.

This Court on November 26, 1941 having appointed Thomas Raeburn White, Esquire, Special Master with authority to examine, investigate and to make and report to this Court his findings and conclusions concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman, and former Circuit Judge J. Warren

Letter from Ralph S. Harris to William P. Rowland, dated June 24, 1946

June 24, 1946.

William P. Rowland, Esq., Clerk,
United States Circuit Court of Appeals,
2046 United States Court House,
Philadelphia 7, Pennsylvania

Re: Root Refining Company v.
Universal Oil Products Company

Dear Sir:

In response to your letter of June 20, 1946, I beg to advise as follows:

We are giving the matter consideration and, as I expect to be in Chicago this week, I shall consult with the *amici* and see if we can arrive at some agreed further disposition of the matter to be suggested to the Court. In any event, I shall communicate with you next week.

Very truly yours,

RALPH S. HARRIS

RSH:RC

Letter from J. Bernhard Thiess and Thorley von Holst to William P. Rowland, dated June 25, 1946

June 25, 1946

William P. Rowland, Clerk
United States Circuit Court of Appeals
for the Third Circuit
2046 U. S. Court House
Philadelphia 7, Penna.

In re: Root Refining Company, Defendant Appellant, vs. Universal Oil Products Company, Plaintiff Appellee, Nos. 5546 and 5648.

Dear Mr. Rowland:

In answer to your letter of June 20th, it would appear that the present status of the above-entitled appeals is that the order of December 29th, 1944, is reversed except as to the allowance of the master's fees and expenses, and that the order of June 15, 1944, is unaffected. Accordingly, the next step to be taken would seem to be for the Court of Appeals to send down its mandate directing the payment by Universal to *amici curiae* of the fees and expenses of the master, and dismissing the bill of complaint for unclean hands in accordance with the thought suggested in your letter of January 17, 1945.

It seems quite clear that the Supreme Court has upheld the jurisdiction of the Court of Appeals to conduct the investigation, and that the order of that Court of June 15, 1944, vacating and setting aside the fraudulently obtained judgments of June 26, 1935, is not touched by the Supreme Court's opinion.

However, we suggest that the Court of Appeals will probably want to defer further action pending the outcome of a petition for rehearing which we are preparing and will file shortly in the Supreme Court, at which time we shall also move that court to stay its mandate until decision on the petition.

Yours very truly,

J. Bernhard Thiess
Thorley von Holst

TvH:GO
cc: Ralph S. Harris, Esq.

Letter from Ralph S. Harris to William P. Rowland, dated June 28, 1946

June 28, 1946.

William P. Rowland, Esq., Clerk,
United States Circuit Court of Appeals
for the Third Circuit,
2046 United States Court House,
Philadelphia 7, Pennsylvania.

Re: Root Refining Company, Defendant-Appellant v. Universal Oil Products Company, Plaintiff-Appellee, Nos. 5546 and 5648.

Dear Mr. Rowland:

Further in response to your letter of June 20, 1946, I beg to advise as follows:

I am now in receipt of a copy of a letter to you dated June 25, 1946, presumably signed by Mr. Thorley von Holst, which was in reply, apparently, to a letter to him and Mr. Theiss from you similar to your letter to me of June 20, 1946.

In his letter to you, (1) Mr. von Holst suggests that the order of the Court of Appeals of June 15, 1944 is unaffected by the decision of the United States Supreme Court and that it would be appropriate for the Court of Appeals "to send down its mandate * * * dismissing the bill of complaint for unclean hands * * *", and (2) he apprises you of the proposal of himself and Mr. Theiss to file with the Supreme Court a petition for rehearing and to move the court for a stay of its mandate in the meantime.

I yesterday conferred with Messrs. Theiss and von Holst in Chicago and was at that time advised of the contents of their letter to you.

While I assume that the Court of Appeals will not take any further action until the mandate of the Supreme Court is received, Mr. von Holst's suggestion is so at variance with what we believe to be the plain import of the decision of the Supreme Court, that it becomes important that I should take issue with Mr. von Holst's suggestion and submit mine at this time.

It is true that the order of the Court of Appeals of June 15, 1944 was not the subject of an appeal to the Supreme Court. Such an appeal was not taken by us because we doubted our ability to do so since (a) Universal had consistently consented to the entry of an order setting aside the judgments and restoring them to the calendar for reargument, and (b) we doubted whether the order of June 15, 1944 was final.

The subsequent order of the Court of Appeals allowing counsel fees and expenses was final and, hence, *certiorari* was granted by the Supreme Court with respect thereto. This latter order of the Court of Appeals depended for its validity upon the validity of the order of June 15, 1944. As we see it, the decision of the Supreme Court regarded the order of June 15, 1944 (except in so far as it was consented to by Universal and that of course without any admission of fraud) as an order which the Court of Appeals had no jurisdiction to enter and consequently that order was a nullity.

As recited in the opinion of the Supreme Court:

> "Universal offered to consent to a reargument of the *Root* case and to preserve to the Root Company the benefits of the existing agreement, even if Uni-

> versal should prevail upon reargument. Throughout these proceedings Universal stood ready to carry out this offer * * *."

With respect to the validity of the order of the Court of Appeals dated June 15, 1944 the Supreme Court, while recognizing the "inherent power of a federal court to *investigate* whether a judgment was obtained by fraud" held:

> "But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. * * * But, obviously, a court cannot deprive a successful party [Universal] of his judgment without a proper hearing. * * * But if the *judgment could not be nullified* without adequate opportunity to be heard in a proper contest, neither is it just to assess the fees of attorneys and their expenses in conducting an investigation where petitioner throughout objected to the character of the *investigation* if it was to be used for a basis of *adjudicating* rights."

The Supreme Court stated that the question of whether the Court of Appeals could deprive Universal of its judgment was not before it "except as it bears on the order allowing attorneys' fees and costs".

The Supreme Court then disallowed the attorneys' fees and expenses, except to the extent that Universal had, in the case of the Master's fees and expenses, appeared and participated in the *investigation* with acquiescing knowledge that the court would assess these.

That the Supreme Court regarded the proceedings culminating in the order of June 15, 1944 as lacking the indicia of a case or controversy is inherent in its decision and explicit in its statement of facts. For example, the

Supreme Court stated that the moving attorneys "expressed doubt as to the capacity in which they could formally make such a request of the Court", that their "difficulty was due to the fact that * * * Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the lawsuit", that "the other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case", that the moving attorneys "could not move on their behalf to have the *Root* decree vacated * * *", and that the oil companies "would not subject themselves to the court's jurisdiction and the hazard of an adverse determination."

Under all of the foregoing circumstances, it is my opinion that the order of June 15, 1944 should be resettled by the Court of Appeals. In fact, in strict conformity with the findings of the Supreme Court that it is a legal nullity, it should be stricken from the record but, since Universal has always consented that the judgments be set aside, we suggest that, although there is no adversary party who can give like consent, the order of June 15, 1944 be resettled to provide that the judgments of the Court of Appeals in the *Root* case be set aside "upon the consent of Universal" and that, for the reasons hereafter appearing, the appeals be dismissed as moot.

I suggest that the appeals are moot for the following reasons:

Root made two settlements with Universal, one prior and one subsequent to the order of June 15, 1944. The latter settlement contains provisions that the parties agree (a) that the decree of the District Court in the Root case "shall be vacated", (b) that the bills of complaint in said

suit "shall be dismissed", and (c) "that either party may cause an order or orders to be entered * * * without further notice to the other".

It thus appears that Root Refining Company can have no possible interest in further proceedings. Nor can the other oil companies have a further interest since the infringement suits against them, in which the plea of *res judicata* was set up by Universal, have all been dismissed.

Furthermore, of the two patents involved in all of the cases, the Dubbs patent expired in 1938 and, hence, the statute of limitations bars further actions thereon, and the Egloff patent has been held invalid by the Supreme Court in *Universal* v. *Globe*, 322 U. S. 471.

Under all of the foregoing circumstances, it is my judgment that the appeals actually are moot and that an order to that effect is appropriate. In the light of the decision of the Supreme Court it seems to me that this is the utmost which the Court of Appeals should seek to do, even with the consent of Universal.

So far as directing Universal to make payment of the fees and expenses of the Master is concerned, it will not be necessary to enter an order on that as Universal will make such payment at the appropriate time without the entry of such an order, unless there should be a rehearing and, thereafter, the Supreme Court should otherwise direct.

Very truly yours,

Ralph S. Harris

RSH:RC

cc: Messrs. J. Bernhard Theiss
and Thorley von Holst

Letter from William P. Rowland to Ralph S. Harris, dated July 2, 1946

OFFICE OF THE CLERK

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

2046 U. S. Court House

PHILADELPHIA 7

July 2, 1946

Ralph S. Harris, Esq.
Dwight, Harris, Koegel & Caskey
100 Broadway
New York City 5

Dear Sir:

Yours of June 28th came duly to hand regarding the cases of Root Refining Co. vs. Universal Oil Products Co., Nos. 5546 and 5648. We have brought it to the attention of the court.

Very truly yours,

W. P. ROWLAND
Clerk

Letter from J. Bernhard Thiess and Thorley von Holst to William P. Rowland, dated October 16, 1946

October 16, 1946

William P. Rowland, Clerk,
United States Circuit Court of Appeals
for the Third Circuit,
2046 U. S. Court House,
Philadelphia 7, Pennsylvania.

In re: Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee
Nos. 5546 and 5648

Dear Mr. Rowland:

We would be obliged to you if you would bring to the attention of the Court of Appeals that the Supreme Court, on Monday, October 14, 1946, denied the Petition for Rehearing in the above entitled cases.

We believe that the present record in this case and the decision of the Supreme Court furnish an ample basis for the final order suggested by us in our letter of June 25, 1946. However, if this Court should hold the view that the matter would be left in a more satisfactory condition by an alternative procedure, we respectfully suggest the following:

(1) The view most favorable to Universal that can be taken is that while the Supreme Court sustained the judicial power of this Court to conduct the fraud inves-

tigation, it added the admonition that if the property rights of Universal were to be affected by any consequent action by this Court, the requirements of due process would, of course, have to be observed. This admonition was prompted, no doubt, by Universal's contention that due process was not accorded to it, but there was no finding by the Supreme Court that Universal was correct in this contention. The discussion was on an "if" basis. But since the contention was made and probably will continue to be made by Universal, it might be thought a more conclusive result to eliminate that contention by affording Universal an opportunity to have whatever it is that it contends it did not have before. This, we believe, would reveal to all the lack of substance in the contentions and would put an end to them.

(2) The appropriate procedure in that event would seem to be for this Court to issue an order, directed to Universal and based on the whole record in the case, to show cause why this Court should not enter a mandate directing a final decree dismissing the action because of fraud on the part of the plaintiff.

(3) Such an order could also provide for a hearing on the return to the order at which Universal could have the opportunity (a) to bring before the Court any evidence in its possession opposing the rule; (b) to raise any question of the competency of any evidence in the record before Mr. White which it thinks was admitted through the failure, as it has contended, to observe the rules of evidence; and (c) to present any evidence it thinks was excluded by the alleged failure to observe those rules.

(4) In aid of its return to this order, Universal could be given the opportunity to have a representative examine all government files which Mr. White examined and to bring in evidence any documents found there which it thinks were improperly left out by Mr. White, or which it thinks improperly influenced him. We do not think such an inspection is necessary to due process, but we believe it would show that the contention of improper inspection is a sham.

(5) At the hearing on this order, which could be held before this Court or before a referee, any new evidence could be considered in conjunction with the evidence already of record, and a new determination made of the question whether there was such fraud as to warrant a dismissal. Every requirement of notice and hearing essential to due process, even under the strained contentions of Universal, would have been met beyond question, and the resulting mandate and decree would have an indubitable finality and conclusiveness.

(6) We reject entirely the notion advanced by Universal that the case be dismissed as moot. Individual questions of patent validity or infringement for damages may be moot, but the power of the Court to determine and to act on matters touching its own integrity continues; and in the exercise of that power, the Court can and should take such final action as will protect this integrity. A dismissal because the patent questions are moot would not accomplish the purpose for which that power of self-protection exists.

(7) The suggestion in Mr. Harris's letter of June 28, 1946 (p. 3, third full paragraph) that the proceed-

> ings culminating in the order of June 15, 1944, were lacking "the indicia of a case or controversy" is of course wholly met by the Supreme Court's holding that "the inherent power of a federal court to investigate whether a judgment is obtained by fraud, is beyond question."

We also wish to mention the fact that any order entered should provide for the assessment of the Master's fees and expenses as allowed by the Supreme Court decision.

If the Court should feel that a hearing will be of aid to it in this matter we desire to signify our readiness to appear at Philadelphia for that purpose.

Yours very truly,

J. BERNHARD THIESS
THORLEY VON HOLST

TvH:MS
cc: Ralph S. Harris, Esq.

Letter from Ralph S. Harris to William P. Rowland, dated October 18, 1946

October 18, 1946.

William P. Rowland, Clerk,
United States Circuit Court of Appeals
for the Third Circuit,
2046 United States Court House,
Philadelphia 7, Pennsylvania.

In re: Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee, Nos. 5546 and 5648.

Dear Mr. Rowland:

I am this morning in receipt of a letter dated October 16, 1946 addressed to you and signed by Messrs. J. Bernhard Thiess and Thorley von Holst.

For the information of the Court, I enclose herewith printed copies of the Petition for Rehearing and Supplement to Petition for Rehearing addressed to the Supreme Court in the *Root* matter by Messrs. Thiess and von Holst. As you are advised by them, and probably now by the Clerk of the Supreme Court, the motion for rehearing was denied on October 14, 1946.

In response to your letter dated June 20, 1946 sent both to Mr. von Holst and to me, Mr. von Holst responded under date of June 26, 1946 and I responded under date of June 28, 1946. In my letter I attempted accurately and conscientiously to interpret the opinion of the Supreme Court in

the matter. Upon receipt of a copy of it, Messrs. Thiess and von Holst reproduced it along with your letter of June 20, 1946 and their letter of June 26, 1946 in the enclosed Supplement to Petition for Rehearing and submitted it promptly to the Supreme Court for consideration in connection with the Petition for Rehearing.

By way of introduction to the letters, Messrs. Thiess and von Holst in their Supplement stated,

> "Inasmuch as Universal's letter [dated June 28, 1946] takes the unequivocal position that this Court's opinion of June 10, 1946 holds that the order of June 15, 1944 is a 'nullity', we respectfully submit that this letter in itself furnishes a cogent reason for granting the petition for rehearing."

The argument that my letter of June 28, 1946 did not properly and accurately interpret the decision of the Supreme Court was thus squarely put before the Supreme Court as a ground for rehearing. The denial by the Supreme Court of the Petition for Rehearing, therefore, leads to but one conclusion, namely, that the Supreme Court found no inconsistency between its opinion if the *Rooi* matter and my interpretation thereof set forth in my letter of June 28, 1946. It seems to me, therefore, that the Court of Appeals should unquestionably regard that matter as having been determined by the Supreme Court.

In view of the foregoing, it is not necessary, at least at this time, to enter into a prolonged response to the suggestions contained in the present letter of Messrs. Thiess and von Holst to you dated October 16, 1946.

Suffice it to say that the Supreme Court did hold that the order of June 15, 1944, in so far as it should be deemed to affect the property or rights of Universal, denied Uni-

versal due process of law and was not entered in an adversary proceeding. There can be no doubt that the Supreme Court has held that the proceeding was not adversary. It was an issue sharply argued in the briefs before it and constituted the greater part of the discussion between the Bench (particularly the late Chief Justice Stone, Mr. Justice Frankfurter and Mr. Justice Rutledge) and Mr. von Holst upon the argument. Furthermore, in the opinion Mr. Justice Frankfurter says that the "difficulty [of *amici*] was to the fact that * * * Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the law suit", that "The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case", that the moving attorneys "could not move on their behalf to have the *Root* decree vacated * * *", and that the oil companies "would not subject themselves to the court's jurisdiction and the hazards of an adverse determination".

The procedure suggested by Messrs. Thiess and von Holst would, of course, fly precisely in the face of the holding of the Supreme Court. There would still be no adversary parties before the Court and, consequently, no judgment affecting the rights and property of Universal could be entered. Furthermore, due process having been denied in the making of the record, that omission could not be cured by permitting Universal to present objections to bits of the record already made or to offer supplements thereto while leaving the record already made otherwise intact. The very vice which the Supreme Court pointed out would thus be perpetuated.

Only in a true adversary proceeding where a record is made in a court of competent jurisdiction in conformity

with "the usual safeguards of adversary proceedings" can that issue be determined against Universal or its property or rights.

It is respectfully suggested that the request by Amici for further consideration by this Court is merely another endeavor to utilize this Court as an instrument for the private gain of the private clients of Amici. After the entry of the order of December 29, 1944 and prior to the decision of the United States Supreme Court in this matter, Amici, as attorneys for private interests (as well as Arthur Logan of the Delaware Bar who claims to be one of them) commenced litigation against Universal Oil Products Company in Illinois, Delaware and New York. The aggregate damages claimed in these actions are several million dollars. In each of the actions the alleged fraud of Universal in connection with the *Root* case is made the cornerstone or one of the cornerstones for plaintiffs' alleged right of recovery. In view of the Supreme Court decision it is apparent that plaintiffs in these actions, in order to succeed, must there establish the fraud which they allege. Amici as attorneys for private interests should be left to the plenary suits already instituted and Universal should be permitted there in litigation conducted according to the requirements of due process of law to endeavor to vindicate its integrity.

The suggestion of Messrs. Thiess and von Holst with respect to the matter being moot is contrary to our suggestion. We did not suggest that the case "be dismissed as moot" although that is the very remedy which Messrs. Thiess and von Holst earlier suggested to this Court shortly after the entry of the order of June 15, 1944.

I suggested that the *appeals* be dismissed as moot, for the reasons set forth in my letter of June 28, 1946. This seemed appropriate not only in the light of the opinion of

the Supreme Court but in view of the provisions of the order of the Court of Appeals of June 15, 1944 setting the appeals down upon the argument list. Obviously, those appeals are moot since (a) Root and Universal have settled their controversy, (b) the Egloff patent has been held invalid by the Supreme Court, (c) the Dubbs patent expired more than six years ago, and (d) the actions in which Universal set up the Root judgment as *res adjudicata* have all been dismissed with prejudice.

So far as the payment of the Master's fees and expenses, as allowed by the Supreme Court, is concerned, I have advised Messrs. Thiess and von Holst that a judgment need not be entered for this and upon applicaton of Amici Universal is prepared to pay this amount.

Unless the Court shall be in accord with our views, it would perhaps be desirable at the Court's convenience to have a conference on the matter.

Sincerely yours,

RALPH S. HARRIS

RSH:RC

Enclosures 2

cc: Messrs. J. Bernhard Thiess
and Thorley von Holst

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY, et al.,
Defendants-Appellants,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

PETITION OF SKELLY OIL COMPANY FOR LEAVE TO INTERVENE

MARVEL & MORFORD,
Delaware Trust Building,
Wilmington 28, Delaware,
Attorneys for Petitioner.

WILLIAM H. DAVIS,
W. P. Z. GERMAN,
JOHN HOXIE,
of Counsel.

October 29, 1946

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY, *et al.*,
Defendants-Appellants,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

PETITION FOR LEAVE TO INTERVENE

Petition

1. Skelly Oil Company, by its attorneys, respectfully asks leave to intervene in the above actions pending in this Court, and within the limits of the proposed pleading annexed hereto, to participate in any further proceedings in this Court or in the district court on the question whether there should be a dismissal for fraud.

2. The general ground, stated more fully below, is that in another action brought against petitioner by Universal Oil Products Company, petitioner has a defense of unclean hands which is based on the fraud in this case and which involves questions of fact and of law in common with those

to be decided in this case on the pending question of a dismissal for fraud. That other case is identified as *Universal Oil Products Co.* v. *Skelly Oil Co.,* No. 3781 in this court and No. 582 in Equity in the district court of Delaware, here referred to as the Skelly case. Further, petitioner has a claim against Universal Oil Products Company for damages caused by that fraud and is asserting that claim in an action at law, along with other plaintiffs, in the Circuit Court of Cook County, Illinois, Docket No. 46 C 5372. That action likewise presents questions in common with this Root case. For the present petition, we show in detail below only the facts concerning the Skelly case in this circuit (No. 582, district of Delaware) since the common questions which it and the Root case present are a sufficient ground for intervention.

3. The purpose would be to have those common questions decided in a single proceeding in which a conclusive judgment could be rendered between petitioner and Universal, foreclosing re-litigation or attempted re-litigation of those questions in the Skelly case and removing all question as to what the effect would be in the Skelly case if they were to be decided in this case without petitioner's participation.

4. Petitioner recognizes that there may be a preliminary question as to what further proceedings are necessary or desirable in this case as a basis for determining its final disposition. Two of the three suggested procedures now before this Court call for a summary disposition of the case, that is, (a) a dismissal of the appeals on the ground that they are moot, as suggested on Universal's part, or (b) according to one of the suggestions of *Amici,* a dismissal

for fraud on the basis alone of the present record and this Court's Order of June 15, 1944. A third suggestion, put forward in the alternative by *Amici,* would involve a further hearing, either in this Court or on remand, under a show cause order which, as we understand it, would treat the present evidence as creating at the least a *prima facie* case of fraud and would provide that a final disposition should not be made until after Universal has had an opportunity to rebut that *prima facie* case and overcome what it alleges were deficiencies of due process or regular trial procedure.

5. On that preliminary question, one purpose of the intervention would be to urge that there be such a further proceeding under a show cause order; but not because there was in fact a lack of due process. Petitioner's interest is in having a conclusive determination of the fraud question in this case which will not leave for consideration in the Skelly case the contentions now being made by Universal that the former finding of fraud is a nullity, that there was a lack of due process, and that the Supreme Court decision devitalized the finding of fraud. (e. g., in its counsel's letter of June 28, 1946 which appears in the Supplement to the Petition For Rehearing in the Supreme Court). Equally, it would seem to be to the interest of Universal to have the matter concluded in this case where the fraud is alleged to have occurred, since if it can rebut the present evidence of fraud, the matter would be foreclosed as between it and petitioner. We respectfully suggest also that it is in the interest of this Court, as the tribunal primarily imposed upon, to have those contentions disposed of conclusively in this case; and especially as to the contention of lack of due process, to dispose of it by according to Universal a full

opportunity to overcome what it contends were the deficiencies. It is not appropriate, as it seems to us, that in another case in this circuit ultimately reviewable by this Court, a party who has been found by this Court to have defrauded it should be left free to contend that that finding is a nullity and that the matter can be relitigated, when those contentions can be considered and either eliminated or conclusively determined by brief further proceedings in this case.

6. Petitioner makes no suggestion on the question whether such further proceedings should be in this Court or in the district court upon remand. We believe that is for this Court's determination without regard to private interest, since such proceedings would have the paramount purpose of assuring a final decree which, if the whole record shows that there was a fraud, would fully and conclusively establish the efficacy of a court's power to protect and to vindicate itself. With respect to the bearing of intervention on this question of forum, petitioner recognizes that intervention is ordinarily a district court procedure (Rule 24) but believes that it is permissible in an appellate court when (as here) it introduces no new question (cf., *Scrugham* v. *Shoup*, 256 Fed. 325, C. C. A. 3) and especially when the matter in question originated in the appellate court under its inherent power of self-protection and as a distinct phase of a case controlled by mandate of that court at the time the matter arose. This is not an intervention to assert a claim, or a defense to the claim of the main case, but is solely to permit participation in the hearing and determination of questions common to the main case and another case involving the intervener, a type of intervention recognized as being essentially a species of

joinder of parties and a procedure to be employed wherever possible to avoid repeated litigation of a question. (See Moore, Vol. 2, p. 2366, Sec 24.10; and note *Securities Commission* v. *U. S. Realty Co.*, 310 U. S. 434 at 459).

7. We ask that this petition be considered to embrace, as an alternative to intervention in this Court, the following alternative, or any further alternative agreeable to this Court which would attain the same end of a single conclusive determination of the questions common to the two cases. If the case is remanded for further proceedings in the district court upon a show cause order to determine whether there should be a dismissal for fraud, petitioner asks that the mandate contain either a directive that this intervention be permitted and that the annexed pleading be filed, or a provision that the district court shall have leave to entertain a like petition for intervention.

8. In any event, petitioner asks leave to intervene in this Court for the preliminary question as to what further proceedings should be had in this case, leaving the question of intervention for other purposes to be decided after the determination of that preliminary question and of the further question whether such proceedings should be in this Court or in the district court upon remand.

Statement of Facts

9. The common questions, generally stated, are: (a) whether in the Root case there was such fraud on this Court by Universal as to require that an action to which that fraud had a relation be dismissed under the unclean hands doctrine, as a sanction in protection and vindication of the interest of the court; and (b) the subsidiary question as to the present status and effect of the Order of this Court

entered in the Root case on June 15, 1944, finding that there had been a fraud on this Court.

10. The Skelly case is now in the district court for the district of Delaware under an Order of this Court entered December 21, 1944 which gave the district court leave to consider, and gave the defendant Skelly (this petitioner) leave to present "such matters of defense as the defendant may have as a result or because of plaintiff's fraud in connection with its suits against Root * * *".

11. Pursuant to that Order, on February 3, 1945, Skelly filed in the district court a Supplemental Pleading in which it set forth such matters of defense. A certified copy is filed herewith and a copy is annexed as Appendix 2. The district court thereupon ordered Universal to reply or otherwise plead to that pleading on or before March 3, 1945; but on March 1, 1945, it appearing that Universal had filed a petition in the Supreme Court seeking a review of matters in the Root case, the district court entered an order staying proceedings in the Skelly case (Appendix 3). Presumably this stay will soon end, since the Supreme Court proceedings in the Root case have terminated, and Universal will shortly reply or otherwise plead to Skelly's Supplemental Pleading of February 3, 1945.

12. The substance of Skelly's Supplemental Pleading divides into two parts, viz.; (a) the recital of the fraud of Universal as set forth in the Order of June 15, 1944 in the Root case in which this Court approved the finding of its referee, Thomas R. White, Esq., that there had been such fraud as to invalidate the 1935 judgments; and (b) the recital of facts showing that that fraud had an immediate and necessary relation to the claim made by Universal against Skelly under its Trumble patent in the Skelly case.

The relief sought includes, *inter alia,* a dismissal for unclean hands, and the matter pleaded is essentially one governed by the doctrine of unclean hands and the rule of *Keystone Driller Co.* v. *General Excavator Co.,* 290 U. S. 240, just as is the matter of the final disposition of the Root case. The issues that will arise concerning the relation of the fraud to Universal's claim in the Skelly case have nothing in common with the issues remaining in the Root case, and would remain for determination in the Skelly case.

13. The questions common to the Root case and the Skelly case arise in the Skelly case on that part of Skelly's "supplemental pleading" which sets forth the fraud in terms of this Court's finding embodied in its Order of June 15, 1944. Under that pleading, Skelly has these positions:

(a) The fact of the fraud is established conclusively for the courts of this circuit by the Order of June 15, 1944 in the Root case, so far as concerns application of the doctrine of unclean hands, since that doctrine is for the protection of the courts, not of defendants; and no court of this circuit could do other than dismiss the claim of a suitor who had been found by this Court to have defrauded it, once it found that that declared fraud had a relation to the particular claim being asserted before it. This would present the same question that is presented in this Root case by the suggested dismissal for fraud on the present record and by Universal's contention that the Order of June 15, 1944 is a nullity, that the proceeding on which it was based was not a case or controversy and did not accord due process to Universal, and that the Supreme Court so held in its decision of June 10, 1946.

(b) As a minimum, the fact of the fraud is established *prima facie* against Universal by the Order of June 15, 1944

in the Root case, the basis of which would be proved by the record of the proceedings before Mr. White as Special Master and before this Court; so that while Universal may present any opposing evidence and may have a determination on the whole record, it is not necessary for Skelly to prove anew the facts making out a *prima facie* case of fraud. This treats the Order of June 15, 1944 in the same way that is proposed as a basis for further proceedings in this case under a show cause order, and such proceedings would directly parallel those in the Skelly case under this proposition of Skelly; hence the same questions would arise as to the present status and effect of the Order of June 15, 1944 in the Root case, the same further evidence would be produced, and the same ultimate issue would be determined.

(c) The fact of the fraud may be proved anew by calling the necessary witnesses where possible, and otherwise, within the applicable rules of evidence, by offering the record of the testimony before Mr. White in the Root case as former testimony taken on the same issue in a proceeding in which Universal had an opportunity of cross examination. Whether this will be done depends on circumstances not yet definite. Hence we can not say with the same certainty as above that in this respect there are common questions, but cite only the possibility. If for any reason the fraud should be proved anew in this Root case, it could be done in the same way and the same questions would arise.

14. In summary, on any proposition that may be advanced with respect to the fraud and the proper consequent action by the court in protection of its interest, it is quite certain that in any case Universal will continue its contentions (a) that the Supreme Court's decision makes the June 15, 1944 Order a nullity; (b) that the Supreme Court sus-

tained Universal's view that the fraud proceeding was not a "case" or "controversy" in the constitutional sense, including its point about the lack of adversary parties; (c) that there was irregularity and an absence of due process in the fraud proceedings in the Root case; and (d) that the appeals in the Root case are moot. The objective of Universal seems to be to have the Root case terminated in a way that is either inconclusive or that would affirmatively support its contentions that there is no finding or judgment of legal effect as to the fraud.

15. Petitioner is one of the companies on whose behalf the counsel who are now *Amici Curiae* in these cases appeared before this Court on June 5, 1941 when the fraud proceedings originated, and in whose interest said counsel were recognized as acting, while also acting in the interest of this Court, throughout those proceedings before the Special Master, in this Court and in the Supreme Court. Petitioner believed that it was in all substantial respects a party to said proceedings until in the opinion of the Supreme Court rendered June 10, 1946 it was stated that it did not have that status. The power of this Court to bring before it all those who may be affected by the outcome of its investigation was declared by the Supreme Court.

SKELLY OIL COMPANY,

By MARVEL & MORFORD,
its Attorneys,
Delaware Trust Building,
Wilmington 28, Delaware.

WILLIAM H. DAVIS,
W. P. Z. GERMAN,
JOHN HOXIE,
of Counsel.

Appendix 1

Intervener's Proposed Pleading

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY, *et al.*,
Defendants-Appellants,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

Skelly Oil Company, having been granted leave to intervene in this action, respectfully states:

1. It is a corporation of Delaware, having a principal office at Tulsa, Oklahoma.

2. It is one of the group of companies whose counsel acted as *Amici Curiae* in this case and, in so acting, stated that they were also acting in the interest of their clients including Intervener.

3. It is the defendant in the action of Universal Oil Products Co. against Skelly Oil Company which is No. 3781

in this Court and which is now pending as No. 582 in Equity in the district court for the district of Delaware for accounting proceedings under mandate of this Court and for proceedings under an Order of this Court dated December 21, 1944 granting it leave to present "such matters of defense as the defendant [this Intervener] may have as a result or because of plaintiff's [Universal's] fraud in connection with its suits against Root * * *" that is to say, the present action.

4. Pursuant to that Order of December 21, 1944, it has filed in said district court a Supplemental Pleading averring the fraud of Universal Oil Products Company upon this Court as found by this Court in its Order in this case dated June 15, 1944, and further averring facts showing the relation of that fraud to the claim for equitable relief asserted by Universal against it in said accounting proceedings. For relief, it sought, *inter alia* in said Supplemental Pleading, a dismissal of the action under the doctrine of unclean hands.

5. It is also one of the plaintiffs in an action at law against Universal Oil Products Company in the Circuit Court of Cook County, Illinois, Docket No. 46 C 5372, for damages caused by the fraud of Universal in this Root case.

6. The present case involves questions of fact and of law in common with the defense set forth by Intervener in the Supplemental Pleading in the said action in the district of Delaware, and in common with the claim in the said action in Illinois. Among said common questions is the ultimate question whether said Universal Oil Prod-

ucts Company was guilty of a fraud upon this Court in this case, and as to the said action in Delaware, the further question whether the fraud was of such nature as to disqualify it under the doctrine of unclean hands from having the aid of a court of equity in any claim to which that fraud was related.

7. Intervener avers that said Universal was guilty of such fraud, that this Court so found in its Order of June 15, 1944 in this case, that the evidence in this case supports that Order and the Order was entered in a proceeding in which Universal was accorded due process, that as a minimum the evidence in this case creates a *prima facie* showing of such fraud, and that that evidence and the said Order of June 15, 1944 justify an Order by this Court that Universal show cause why it should not be finally dismissed in this action because of its fraud on this Court. Intervener further avers that it is in the interest of a prompt and conclusive determination of the questions common to this case and the said case of Universal against it that Universal be so ordered to show cause and that a hearing and determination on the return to that order be had either in this Court or before a Special Master or a district court to whom the matter may be referred, subject to review by this Court.

Wherefore, Intervener asks:

(a) That this court enter an order upon the plaintiff, Universal, to show cause why there should not be a dismissal for fraud; or in the alternative, that this court remand this case to the district court with direction to enter such an order and to enter

a final decree in accordance with its determination, upon the return to said order and hearing thereon, whether there should be a dismissal for fraud;

(b) That upon the return to said order and hearing thereon, there be a dismissal for fraud, and a final decree declaring that the plaintiff has been guilty of a fraud on this court and that under the doctrine of unclean hands the plaintiff is disqualified from having the aid of a court of equity in support of any claim to which that fraud had a relation; and

(c) That Intervener be awarded its costs and such other relief as may be just.

SKELLY OIL COMPANY,

By .....
its attorneys,
Delaware Trust Company
Wilmington 28, Delaware.

Appendix 2

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF DELAWARE.

No. 582 IN EQUITY

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff,

v.

SKELLY OIL COMPANY,
Defendant.

AND NOW, to wit, this 3rd day of February, 1945 the motion of the defendant for leave to file a supplemental pleading having been presented and maturely considered by the court.

IT IS ORDERED that leave be and it is hereby granted the defendant to file the annexed supplemental pleading and that the supplemental pleading be filed by the Clerk and stand as and for the supplemental pleading of the defendant herein;

AND IT IS FURTHER ORDERED that the plaintiff reply or otherwise plead to the supplemental pleading on or before the 3rd day of March, 1945.

(Sgd.) JOHN BIGGS, JR.,
Judge.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF DELAWARE.

No. 582 IN EQUITY

UNIVERSAL OIL PRODUCTS COMPANY,

Plaintiff,

v.

SKELLY OIL COMPANY,

Defendant.

Supplemental Pleading

Pursuant to Order of this Court entered on defendant's motion filed January 22, 1945, and to the Order of the Circuit Court of Appeals entered December 21, 1944, defendant presents this supplemental pleading to set forth the matters of defense which it has as a result of or because of plaintiff's fraud in connection with its suits against Root Refining Company et al. at Nos. 5648 and 5546 on appeals to the Circuit Court of Appeals. The judgment sought is based on the equitable doctrines of "unclean hands" and of doing complete justice.

1. On June 26, 1935 judgments were entered in the United States Circuit Court of Appeals for the Third

Circuit in the cases of Universal Oil Products Company (plaintiff herein) against Root Refining Co. and Winkler-Koch Engineering Company (hereinafter called the Root case) Nos. 5648 and 5546 in said court, according to which Dubbs patent 1,392,629 owned by plaintiff was held to be valid and to have been infringed by the "clean circulation" oil cracking process practiced by Root in its Winkler-Koch stills.

2. In 1937, in another action, No. 893, brought in this court in 1931 by plaintiff against defendant and another charging defendant with infringement of Dubbs patent 1,392,629 in its use of Winkler-Koch cracking stills, plaintiff pleaded that defendant was bound by the judgments in the Root case by reason of participation in and contribution to the defense of the Root case.

3. On June 15, 1944, the said judgments in the Root case were vacated by an Order of said Court adopting as its findings of fact and conclusions of law the findings of fact and conclusions of law reported to it on October 19, 1943 by Thomas Raeburn White, Esq., Special Master. The said findings and conclusions, in summary, were that in connection with the said Root case there was such fraud as tainted and invalidated the said judgments rendered therein and that the said judgments were tainted with fraud and corruption and were invalid.

4. During the period of this defendant's use of its Jenkins stills for which it has been ordered to account herein, it could have used stills of the Holmes-Manley type employing a clean circulation process instead of the

Jenkins stills employing a dirty circulation process; and in the accounting proceedings herein the Holmes-Manley process would have been available as a standard of comparison for the Jenkins stills, had it not been for the tainted judgments in the Root case. Under those judgments the Holmes-Manley process was an infringement of plaintiff's Dubbs patent 1,392,629. The Holmes-Manley process was superior to the Burton-Clark process and was superior to the so-called Operation B put forward in this case as a standard by plaintiff.

5. Plaintiff's fraud in the Root case had an immediate and necessary relation, at the time it was perpetrated, to the claim asserted by plaintiff in the accounting proceedings in this case, making the assertion of that claim inequitable. That relation existed by reason of the close relationship between this case and the Root case; and in particular by reason of each and of all of the following facts among others. This case and the Root case were prosecuted by plaintiff as coordinated parts of a single scheme to subject this defendant, other refiners and the public to a monopoly of the continuous cracking of oil to make gasoline, and to maintain plaintiffs' non-competitive royalty for the Dubbs process. The interpretation of the Dubbs patent in relation to the Winkler-Koch process presented substantially the same question as in relation to the Holmes-Manley process so that the decision on the interpretation of the Dubbs patent in the Root case was inherently related to the question of the status of the Holmes-Manley process as a standard of comparison in this case and thereby to the basis and amount of plaintiff's claim in the accounting proceedings in this case. The mo-

nopolies asserted under the Trumble patent in this case and the Dubbs patent in the Root case were inherently contradictory and the premises necessary to sustain either one in the broad scope asserted for it would either defeat the other or put its validity in doubt, so that it was inherent in the subject matter of the Root case that the decision of the Court of Appeals therein should have a relation to and an effect upon plaintiff's claim in this case. The Trumble patent and the Dubbs patent were so related to each other and to the earlier Burton-Clark process in time and in subject matter that the Root case involved questions in common with those involved on plaintiff's claim in the accounting proceedings in this case, including among others questions with respect to the advance of Trumble over Burton-Clark, with respect to the relation of the Trumble process to defendant's Jenkins stills as a whole, with respect to the use of the Trumble process by the Shell Company for the making of gasoline, and with respect to the effect of returning dirty or once cracked residuum to the heater of the cracking system. Plaintiff's proofs and representations in this case and in the Root case with respect to those common questions were either so contradictory in substance or of such opposite tenor as to create a real possibility confronting plaintiff at the time of its fraud that a decision sustaining the Dubbs patent would rest on findings detrimentally affecting plaintiff's claim on the Trumble patent in the accounting proceedings in this case or its right to prosecute that claim. In 1934, prior to the hearing on the appeal in the Root case, this defendant had presented to the Court of Appeals in this case a motion for leave to present evidence in this case of certain proofs and representations made by plaintiff in the Root case; and while that motion

was denied, the situation confronting plaintiff at the time of its fraud in the Root case contained the possibility that the Court on reference to that motion might take action detrimentally affecting plaintiff's claim in this case or its right to present that claim. By reason of plaintiff's proofs and representations in the Root case in comparison with its proofs and representations in this case, plaintiff's claim in the accounting proceedings in this case and its scheme of monopoly were in jeopardy on the appeals of the defendants in the Root case.

6. The tainted judgments and opinion in the Root case so resolved the matters common to that case and to this case that plaintiff was relieved of any consequence of its proofs and representations therein that might otherwise have led to findings detrimental to its claim in the accounting proceedings in this case, and so disposed of matters relating to this case as to forward plaintiff's claim herein. The opinion falsely reconciled the Dubbs patent and the Trumble patent and the monopolies asserted by plaintiff thereunder, and contained statements about the Trumble process which had no evidential basis and which were in accord with contentions of plaintiff on primary issues in the accounting proceedings in this case.

7. During the accounting proceedings in the present case, pending in this court from May 17, 1929 to the present time, plaintiff has engaged in inequitable conduct having an immediate and necessary relation to the claim asserted by it therein, making the assertion of that claim inequitable. That inequitable conduct included among others the following acts. Plaintiff continued the prose-

cution of its claim in this case after its fraud in the Root case and with knowledge of the relation of that case and of the fraud therein to the claim asserted in this case. In framing its prima facie case in the accounting, and thereafter throughout the proceedings, plaintiff took advantage of the tainted judgments in the Root case in presenting a claim to the savings of defendant's Jenkins stills over the said Operation B and (in rebuttal) a claim to the savings over the Casper Burton-Clark operation as a standard of comparison for the Jenkins stills, instead of basing its claim on the superior Holmes-Manley process as the standard of comparison for the Jenkins stills. It expressly invoked and relied upon the tainted judgments in the Root case when defendant moved to strike certain evidence about the operation B standard on the ground that the Holmes-Manley process was the proper standard of comparison. It relied upon the tainted Root judgments to justify its course in not basing its claim on the Holmes-Manley process as the standard. Moreover, in its brief before the Special Master plaintiff again invoked and relied upon the tainted judgments in the Root case, and quoted from the opinion in that case with regard to Trumble.

8. Plaintiff so conducted the accounting proceedings in this case that it made no express commitment in this case with respect to the value of Trumble in comparison with the Burton-Clark process until after the Root case was briefed and argued in the Court of Appeals, and its prima facie case in the accounting proceedings herein was held open until after the decision of the Court of Appeals in the Root case. It thereby was enabled to take advantage in this case of the decision in the Root case and it avoided in the

Root case any impairment of its position there from the enlarged claim it was to make in this case with respect to the value of Trumble in comparison with Burton-Clark. Plaintiff's conduct of the accounting proceedings in this case was dilatory and because of its relation to the conduct of the Root case, was inequitable. It was calculated to facilitate the accomplishment of plaintiff's aims in the prosecution of both cases and to make its fraud in the Root case of maximum benefit to plaintiff in both.

9. The defense against plaintiff's claim in the accounting proceedings in this case has put defendant to very great expense. The continued prosecution of the accounting after plaintiff's fraud in the Root case was vexatious and inequitable. The prosecution of the accounting prior to that fraud was likewise vexatious and inequitable because of the close relation of the two cases and the coordination of their prosecution.

WHEREFORE, defendant demands that the interlocutory judgment heretofore entered herein be vacated and that a final judgment be entered herein providing as follows:

1. That the complaint herein be dismissed;

2. That in consequence of its inequity in the accounting proceedings herein and in relation to the claim asserted in said proceedings plaintiff is not entitled to any recovery of profits or damages herein;

3. That to do complete justice between the parties and as an award of special costs in equity, defendant shall recover

from plaintiff its reasonable expenses incurred in the accounting proceedings herein;

4. That defendant recover its costs herein to be taxed;

5. That defendant have execution against plaintiff for the sums herein awarded.

/s/ JAMES R. MORFORD,
MARVEL & MORFORD,
Attorneys for Defendant,
Delaware Trust Building,
Wilmington 28, Delaware.

WILLIAM H. DAVIS,
W. P. Z. GERMAN,
JOHN HOXIE,
CURT VON BOETTICHER, JR.,
RAYMOND F. ADAMS,
of Counsel.

Appendix 3

Order

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF DELAWARE.

No. 582 IN EQUITY

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff,

v.

SKELLY OIL COMPANY,
Defendant.

AND NOW to wit this 1st day of March, 1945.

IT IS ORDERED that the plaintiff shall not reply or otherwise plead to the supplemental pleading filed by the defendant on February 3, 1945, until further order of the Court.

/s/ JOHN BIGGS, JR.,
U. S. Circuit Judge.

Order of the Court to Hear Argument for Dismissal of the Suits

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY, et al.,
Defendants-Appellants,

vs.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

ORDER

Present: BIGGS, MARIS, GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

AND NOW, to wit, this 16th day of November, 1946, it is

ORDERED that the above entitled causes be and the same hereby are set down for hearing on Thursday, the 19th day of December, 1946, at which time argument will be heard by the court as to the grounds asserted for dismissal of the suits; and it is

FURTHER ORDERED that leave be and the same hereby is granted to Skelly Oil Company to be heard as to its asserted right to intervene in these proceedings and in respect to any other matters which to the court shall seem meet and proper.

For the Court,

BIGGS
U. S. Circuit Judge.

Notice of Motion to Vacate Order of the Court

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROOT REFINING COMPANY, Defendant-Appellant, —against— UNIVERSAL OIL PRODUCTS COMPANY, Plaintiff-Appellee.	Nos. 5546 and 5648

NOTICE OF MOTION

NOW COMES Universal Oil Products Company and, upon all of the proceedings heretofore had herein and upon the agreements between Universal Oil Products Company and Root Refining Company dated as of the 1st day of April, 1939, and the 28th day of July, 1944, respectively, moves this Court for an order vacating the order of this Court heretofore entered on June 15, 1944.

Dated: December 19, 1946.

Yours, &c.,

RALPH S. HARRIS,
JOHN R. MCCULLOUGH,
Office & P. O. Address,
100 Broadway,
New York 5, N. Y.
ROBERT T. MCCRACKEN,
Office & P. O. Address,
1421 Chestnut Street,
Philadelphia 2, Pennsylvania,
Attorneys for Universal Oil Products Company.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY, *et al.*,
Defendants-Appellants

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee

ARGUMENT

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 5546 and 5648

ROOT REFINING COMPANY, *et al.*,
Defendants-Appellants,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

Philadelphia, Pa., December 19, 1946

Before:

Hon. JOHN BIGGS, JR.,
Hon. ALBERT BRANSON MARIS,
Hon. HERBERT F. GOODRICH,
Hon. GERALD MCLAUGHLIN,
Hon. HARRY E. KALODNER.

Present:

RALPH S. HARRIS, Esq.
(100 Broadway, New York City);

ROBERT T. MCCRACKEN, Esq.,
(Philadelphia, Pa.);

JOHN R. MCCULLOUGH, Esq.,
(100 Broadway, New York City), attorneys for Universal Oil Products Company.

F. W. P. LORENZEN, Esq., of counsel.

WILLIAM H. DAVIS, Esq.,

JOHN HOXIE, Esq., of DAVIS, HOXIE & FAITHFULL (20 Pine Street, New York 5),

W. P. Z. GERMAN, Esq.,

THOMAS COOCH, Esq., and

MORTON E. EVANS, Esq., of MARVEL & MORFORD (Delaware Trust Bldg., Wilmington), representing Skelly Oil Company.

THORLEY VON HOLST, Esq.,

J. BERNARD THIESS, Esq.,
amici curiae,

ROBERT W. POORE, Esq., of counsel.

Judge Biggs: Before we commence, I want to state that Judge O'Connell is not here today sitting with this court in banc, because of circumstances over which he has no control, and Judge Kalodner will comprise the fifth member of the court in this case.

Proceed, sir.

Mr. von Holst: May it please this Honorable Court: As a great many months if not years have gone by since these proceedings were originally initiated, it seems to me appropriate at the outset very briefly to sketch those proceedings from their inception down to the present time.

These proceedings originated out of a patent suit which was filed, or, rather, two patent suits which were filed in 1929 and 1931 by Universal Oil Products Company against the Root Refining Company, alleging infringement of the Dubbs patent and an Egloff patent. The actions were con-

solidated for trial and were tried before the late Judge Nields in Wilmington in the summer of 1932. It resulted in a judgment for the plaintiff on both patents.

The causes were appealed, and the judgments on appeal were rendered on June 26, 1935, the opinion being written by the late Judge J. Warren Davis before the Court of Appeals for the Third Circuit. The mandate of the court went down—I should say first that petition for certiorari was filed by Root and was denied in October of 1935. The mandate of this court went down, and pursuant to that mandate accounting proceedings were initiated and were pending until April of 1939, at which time Root took a license from Universal and settled all issues of infringement and the validity of the patents in suit.

In the meantime, similar suits for infringement of the same patents, the Dubbs and Egloff patents, had been instituted by Universal Oil Products Company against numerous other defendants. These defendants all had this much in common, that they all had purchased and were using a Winkler-Koch cracking still, which was the same type of still that was used by the defendant Root in the Root case.

In the trial of that case these other refiners against whom similar suits had been brought had contributed moneys to raise a defense fund for the defense of the Root case, and upon that fact and upon other facts which Universal considered germane, Universal had contended that all these other refiners were bound by the decrees, by the judgments in the Root case on appeal, and they had set up in the complaints brought against these other refiners these judgments as binding adjudications against each defendant. They also set up these judgments as persuasive under the rule of comity.

The next thing in order is that in March of 1941 the United States found an indictment against Judge J. Warren Davis and against an attorney of Scranton, Pennsylvania, named Morgan S. Kaufman for conspiracy to obstruct justice in the Fox bankruptcy matters, and the first trial on that indictment came up in May of 1941. In that trial it developed in the cross-examination of Kaufman that he had represented Universal Oil Products Company in the Root case. That came to the attention of those who were attorneys for the Root Refining Company in that case, they being those who are now before this court under the style of amici curiae.

There was enough developed to put those attorneys upon notice that possibly a fraud had been committed in the Root case. Thereupon they appeared before this court, the Honorable Arthur C. Denison, being then one of their number, on June 5, 1941, on an oral presentation in which the matter was brought to the court's attention, the court sitting in banc, and the suggestion was made that an investigation was in order as to whether or not there had been such fraud as tainted and invalidated the judgments on appeal in the Root case.

Upon suggestion of this court a formal petition was thereafter prepared and filed by Mr. Denison, Mr. Thiess, and myself, our appearance being, as we thought, on behalf of these other oil companies against whom this judgment was being asserted as res judicata, and whom we represented, because we represented each of these other oil companies in these several suits, and also as amici curiae, so that we thought, we believed, that our representation was twofold—on behalf of our private clients, a fact which was always divulged from the very beginning, and also in our

public capacity as being officers of the court and therefore interested in revealing a fraud if any had been committed.

This court in November of 1941 entered its order directing that the question be investigated, appointing Mr. Thomas Raeburn White of this city as special master, with power to issue subpoenas, call witnesses, hear testimony, and with directions that he make his findings on the question of whether or not there had been such fraud as tainted and invalidated the judgments in the Root case.

Thereafter repeated hearings were held before Master White, in all of which Universal was represented. Thirty-two witnesses were called; several hundred exhibits were introduced in evidence; and some testimony was stipulated.

The Master filed his report on October 19, 1943, in which he carefully reviewed the evidence and found that there was such fraud as tainted and invalidated the judgments on appeal in the Root cases.

The next thing that happened after that report of the Master was that briefs—I will state it this way—that Universal filed its exceptions and objections to the Master's report before this court. Briefs were filed in support of those objections by Universal's counsel and against by amici curiae.

The case was fully argued before this court sitting in banc, and on June 15, 1944, this court rendered its decision adopting the Master's report, the Master's findings and conclusions vacating and setting aside the judgments of June 26, 1935, recalling the mandates, and directing the clerk to restore the causes to the argument list for reargument.

I want to comment briefly upon that last clause of that order, and in doing so, to refer back to one aspect of this case that I think ought to be clarified.

In the very first hearing before this court of June 5, 1941, Universal's counsel agreed—offered, rather—to consent to the vacating of the judgments and the reargument of the case, with the understanding that if it should be affirmed on the reargument, Root would be protected in its settlement. If it would be reversed, of course, Root would be clear.

The response of amici at that time to such a suggestion in their brief filed at the time that the formal written petition was filed was that that would be wholly unacceptable to the court and to ourselves who were representing these other clients; that if there was a fraud, the fact of that fraud had to be determined, had to be ascertained; that nothing would be gained by Universal's suggestion that we forget all about the fraud and argue the case over again on the merits; and the court in appointing the master and directing the investigation, of course, refused Universal's suggestion that the matter could be cured, dealt with, disposed of, by simply rearguing the case on the merits.

It is very evident that if a contrary order had been entered, that if the reargument of the cases had been permitted, it would have been a refutation of the doctrine of unclean hands. It would have set a precedent that thereafter if any such question arose in a case, the utmost penalty that would attach to the possible wrongdoer would be that he would simply have to argue his case over again, which, of course, was not consonant with the long-established doctrines of equity as most recently expressed by the Supreme Court in the Keystone Driller case.

I mention that point because there seems to have been some confusion in the Supreme Court's opinion on that question of reargument, and the Supreme Court seems to

indicate that Universal was always ready to reargue the cases and that this court's order of June 15 was in conformity with that offer. I would like to point out—I don't think it can be disputed—that Universal has never been willing or never was willing in the beginning, never acquiesced, in the investigation of the question of fraud, looking to the ultimate setting aside of the decrees for fraud, if it should be found, and I think there is a great difference; and so coming again to the decision of this court of June 15, 1944, that directed the clerk to restore the cases to the argument list for reargument, I point out that the only question that then remained for argument or for final disposition was what form of final order should be entered,—what should be the form of the mandates directed to the District Court for ultimate disposition of the complaints still there pending, and that that is precisely the question that is before the court this morning. The order of June 15 was entirely final, was wholly final, with respect to what disposition it made of the judgments of June 26, 1935, sustaining the validity of the Dubbs and Egloff patents. It set those judgments aside as tainted with fraud. It was final as to them.

After the judgment of this court of June 15, 1944,—

Judge Kalodner: Pardon me, may I interrupt you? Has the Supreme Court so construed the order of this court?

Mr. von Holst: I say that the Supreme Court did so construe the order of this court, Judge Kalodner. I think that it is very clear in that opinion of the Supreme Court, whatever else may not be clear, that the order of June 15, 1944, is not disturbed.

Judge Kalodner: Well, I would just like to read you a sentence or two from the opinion of the court, if I may.

Mr. von Holst: Yes, sir.

Judge Kalodner: You see, this is my first appearance in the case, and I wanted you to get the advantage of my thought in the matter so that you might have an opportunity to set me right in case I am in error.

The court said, on page 3 of the opinion, "Universal offered to consent to a reargument of the Root case and to preserve to the Root Company the benefits of the existing agreement . . ."

Then on page 4, the last paragraph,

> "On the basis of this conclusion, the Court of Appeals on June 15, 1944, entered an order directing that the judgments be vacated and the cause be reargued. The relief thus granted was that to which petitioner had consented before the investigation got under way."

Now, didn't the Supreme Court then construe this order, meaning the order of this court, to mean that there was to be simply a reargument, that there was to be a reargument of the entire matter, nothing more and nothing less, and that there was no such finality to the order of the court as you construe there to be?

Mr. von Holst: If that sentence stood alone, if the Court please, I think there would be some basis for the contention, but it has to be reconciled, I believe, with what appears on page 5 of that same opinion. I would like to refer to the paragraph beginning, "The inherent power of a federal court", and to read that paragraph somewhat at length, because I believe that there is what they actually hold.

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is

beyond question. Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. No doubt, if the court find after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs. Sprague v. Ticonic National Bank, 307 U. S. 161, 167. But, obviously, a court cannot deprive a successful party of his judgment without a proper hearing."

Judge Biggs: They held that this had not been an adversary proceeding and therefore there couldn't have been a final order of this court, because this court couldn't have deprived the Universal of its judgment on the basis of the record as it then existed, because it had not been an adversary proceeding.

Mr. von Holst: I think the next sentence, Your Honor, has to be dealt with.

> "This question is not before us, except as it bears on the order allowing attorneys' fees and costs."

It is incredible to me that if the Supreme Court had meant to tell this court and the world that the proceedings which led up to the order of June 15, 1944, were of no

avail and a nullity, that the court wouldn't have said, "This question of the validity of the June 15, 1944, order is squarely before us and must be set aside, because" so and so and so and so. It seems to me perfectly evident that what has gone before is largely hypothetical.

Judge Kalodner: No, because it seems to me that there were two grounds upon which this case was decided; in other words, upon the ground, first, that it was not an adversary proceeding, and, second, upon the narrower ground, and I point to the fact, too, that Mr. Justice Black concurred in the narrower ground of the opinion, so that he recognized there were two grounds for the finding of the Supreme Court in which he concurred. Will you look at that on the final page?

Mr. von Holst: Yes.

Judge Kalodner: Preceding that the court stated that the case may be readily disposed of on a narrower ground, and that was the ground——

Mr. von Holst: The amici were not entitled to their fees.

Judge Kalodner: And Mr. Justice Black concurred on the narrower ground, so Mr. Justice Black construed it as I construe it. There were two grounds for the ultimate action of the court. There were two bases, in other words, for the decision, and they seemed to hold, as I understand it, that this case is sent back to this court for a reargument. They said that this court now finds itself in a position that it would have been in originally when Universal offered to reargue it. That is why I said what I did to you.

Mr. von Holst: Well, I think, Your Honor, we wouldn't be before this court today if the decision of the Supreme Court were free from ambiguity, and I say that frankly.

We wouldn't be suggesting to this court, as we have in our letter addressed to the clerk of this court, that the final decree here should nonetheless, in spite of what has been held by the Supreme Court, be a dismissal of these cases for unclean hands, if it were clear from this opinion that, as a matter of fact, all that remains to be done is to go back to the time before any fraud was suggested or the time when it was first suggested and do now what Universal first suggested should be done in June, 1944, and I cannot reconcile what Your Honor has suggested with the language of the court which says, "This question is not before us . . ."

Now, what question can that be? Whether a party can be deprived of the judgment without a proper proceeding.

Judge Biggs: Mr. von Holst, didn't the Supreme Court, when they said "This question is not before us," didn't Mr. Justice Frankfurter mean that the only question which was then before the court was the question of fees and the costs of the proceedings? Isn't that the question that he was referring to?

Mr. von Holst: Yes.

Judge Biggs: In other words, Mr. Justice Frankfurter took the position, and the Supreme Court took the position, at least on the broader ground, that the only question was a question of whether or not the court had the power to allow fees to amici and to charge the costs of the proceeding against Universal. Now, as nearly as I can ascertain from the opinion, I thought that the Supreme Court held that the proceeding was not an adversary one, that is, it was a consent proceeding, which I might add was something quite different from what I thought this court had done. However, that was the ruling of the Supreme Court

in that respect, and there being no adversary proceeding, said the court, this is a matter of consent, and since the consent did not go to the allowance of fees to the amici, the court had no power to award them.

Mr. von Holst: May I answer two points?

Judge Biggs: Yes.

Mr. von Holst: It seems to me that we have to, on this question of whether the proceedings were adversary, consider carefully the language on the top of page 5 of the opinion. May I suggest to the court that Universal's position throughout has been that because there were no adversary parties here, there was therefore no jurisdiction of the court to entertain these proceedings and set aside the June 15 order—no jurisdiction of the subject matter.

Judge Biggs: No power.

Mr. von Holst: I would like to express it in terms of jurisdiction of the subject matter. No power means the same thing.

I say that the Supreme Court has not accepted that contention but has directly refuted it.

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. The power to unearth such a fraud is the power to unearth it effectively."

Judge Goodrich: That is the basis for what you just said?

Mr. von Holst: Yes, sir, because Universal had contended throughout that this case was moot because of Root's settlement. Now, if this case was moot because of Root's settement, then there was no case or controversy; there was nothing on which the court could act, and the whole thing was null and that was their contention. That

was their contention that the Supreme Court has not upheld but has directly refuted in the language that I have just quoted you.

Now may I just conclude this thought before it escapes me. That to me means that if there was a case or controversy under the meaning of the constitution, a patent suit started by Universal against Root Refining Company, and there arose in that case a question of unclean hands or fraud perpetrated by bribing a judge, no act of the parties could deprive the court of its inherent power to investigate that fraud and to set aside the tainted judgments. That must be the meaning of the Supreme Court's opinion.

Judge Biggs: The Supreme Court said that we did not do that. They treated the proceeding before the Master almost as if it were a nullity. The Supreme Court apparently took the position that the obtaining of testimony by the court's master was entirely superfluous, that apparently the court satisfied itself in some fashion, but not in a judicial fashion, that the court had been corrupted. In other words, isn't it a fact that what the Supreme Court held was that though it could have done these things as set out in that paragraph, the court did not do that?

Mr. von Holst: I think not, Your Honor. I think what the court says is that *if* the proceedings were conducted so and so, without regard to legal proceedings; *if* the Universal was not given a fair trial, and *if* this and *if* that, then it could not have its property rights adversely affected or its judgment taken away from it, and then they go on to say that that question is not before them except as it bears on the question of whether the fees of counsel should be assessed against Universal.

Now, when it would be so easy, so very easy, so very simple, to say precisely what Your Honor is indicating

the court meant and yet it didn't say it, it seems to me perfectly obvious that they were laying a foundation of hypothesis clear up to the last paragraph on page 5 and then walked away from it and decided the case on the narrower ground. We have all read many, many decisions of the Supreme Court when it is a question of jurisdiction and of holding that proceedings are null and void, and there has never been occasion before that I could see in any opinion to lay a basis upon any hypothesis.

Judge Biggs: You think the Supreme Court walked away from the jurisdictional question?

Mr. von Holst: Yes, except as it upheld it at the top of page 5, and how can you reconcile this language which speaks of the inherent power of a federal court to investigate whether a judgment was obtained by fraud with the supposition that the proceedings throughout were invalid because there were no parties to the case?

Judge Biggs: Of course, I had the view at that time that this court was without jurisdiction to proceed in the premises unless it be by way of a showing of fraud. I think that was expressed several times by me in the previous record.

Mr. von Holst: Yes.

Judge Biggs: In other words, the court would have no power to proceed in any direction unless there was a finding of fraud on the court, because the term had expired, and various other reasons, some technical and some matters of substance, but if your view is correct, then Mr. Justice Black misunderstood what the Supreme Court was doing, didn't he, really, Mr. von Holst? Don't you have to go that far?

Mr. von Holst: You have to read a lot into the word "narrower".

Judge Biggs: Yes, you do.

Mr. von Holst: If he had said "narrow" instead of "narrower",—I just wonder whether Mr. Justice Black meant that whole implication to be read into the word "narrower". I don't see it that way myself. It seems to me that he has read this thing as we read it, came down to there, and then he saw that there was this question of whether the fees could be allowed to lawyers who were being paid by their private clients, and he said, "Oh, well, that disposes of it and that takes care of it," but I can't think that if he had meant to agree that this court was powerless to do what it did do, that there was no jurisdiction because of the settlement, because Universal had offered to reargue the case on the merits, that it wouldn't have been dealt with squarely and exhaustively and at length, because this matter is of great public importance. If it be true that A sues B, and then in ignorance of the fraud B settles, and then it should be shown that A had bribed the court, a judge of the court, that then nothing can be done because B, the only record party, won't appear, why, that is a tremendous decision. In my frank opinion, it is a decision and a holding that would do great harm.

Judge Biggs: But the Supreme Court doesn't hold that. What the Supreme Court said was, You could have done all this in an adversary proceeding. This is not an adversary proceeding; this is a consent proceeding. I don't agree. I might add that my opinion is just the same as it was.

Judge Maris: I don't think they suggested it was an adversary proceeding.

Mr. von Holst: They suggested it was a judicial investigation of a fraud. They do say that Universal had consented to a reargument.

Judge Maris: Yes, but they didn't consent to the investigation.

Mr. von Holst: It is not so stated anywhere in the Supreme Court's opinion. Universal has consented to reargue the case on the merits. Why? As the price for not going into the fraud investigation, and right now its position is essentially the same. Don't dismiss the cases for unclean hands, because we have consented from the beginning that the case should be reargued. The case can't be reargued now because one patent was found valid but not infringed and the other was found to be invalid.

Judge Maris: Is there any real difference in the ultimate results to the parties whether it is dismissed on the grounds of unclean hands or whether it is dismissed because one patent was found valid and not infringed and the other has been dismissed by the Supreme Court as invalid? Is there any real difference to the affairs of these litigants and the persons who have joined in this agreement?

Mr. von Holst: That is a question that is very important, of course. We have given a great deal of thought as to whether we should even come down, but I will give you what is our considered view on that, and it may not be right, but it is what we felt about it.

Here this thing has gone on for a great many years. We think the truth has been ascertained. A great wrong was done, and these different parties who were directly concerned were put to tremendous expense which they shouldn't have been put to. We also feel, however, that a public wrong has been done, and I don't see that that can permit of any dispute, and our feeling, if I may state it, is simply this, that no final act of this court, judicial act, should be

entered which in any way could be construed by the layman or construed by anyone as a sort of condonation or final gesture of futility.

Judge Biggs: But it does have a certain effect upon the accounting proceeding in the Skelly Oil suit, does it not?

Mr. von Holst: That I shall leave, if Your Honor will allow me, to Skelly's counsel, who are here.

Judge Maris: Depending upon the grounds on which the decree of dismissal is put.

Mr. von Holst: I would think so, yes.

You also are aware, if the Court please, that there is pending in Illinois, in the state court of Illinois, a damage suit in which these various defendants against whom the decree, the judgments in the Root case, were set up as *res adjudicata,* or claiming damages because of the fraud, the amount of money that they were put out by defending where they should not have defended—have had to defend—not including the costs of this investigation.

Judge Biggs: Assuming now that we should dismiss the case on the ground of unclean hands, and assuming that that remains the law of the case, what effect would that have on the Illinois suit?

Mr. von Holst: I don't think any, except that this is true, that if it were—you see, that is a jury suit. It is a suit at law for damages.

Judge Biggs: Wouldn't the plaintiffs in that suit go to the court where that suit is pending and prove that we dismissed on the ground of unclean hands and argue that as a fact to the jury?

Mr. von Holst: The plaintiffs?

Judge Biggs: The plaintiffs in that Illinois suit.

Mr. von Holst: Well, we are not quite sure on that, Your Honor.

Judge Biggs: I am not either.

Mr. von Holst: We do think this, that a dismissal just for the case being moot, or any other reason than unclean hands, would be availed of by Universal if it were possible to do so, in any suit now pending, to show that, as a matter of fact, the fraud proceedings were null.

Now, there is a possibility in legal thought—and I frankly state to Your Honors that we are working on it—that the judgment of this court could be relied upon as a judgment *in rem*, and, therefore, if this court hasn't set aside—of course, we think it has already done so in the June 15, 1944, order—that judgment is the judgment of the court which entered the judgments—vacating them and setting aside for fraud, and that that is an *in rem* proceeding that is binding upon all the world; it is a fact established.

Judge Biggs: Under the law of the case?

Mr. von Holst: Yes, and so far as the final act is concerned, the final judgment to be entered, it should be consonant with that.

Judge Biggs: What do you mean by "consonant"?

Mr. von Holst: I will put it this way, Your Honor. If for any other reason a case is to be dismissed for failure of consideration, we will say, or for any other legal reason, it doesn't make any difference and it isn't requisite that the order of dismissal shall state what the ground of dismissal is, as I understand the present practice. If a case is dismissed for lack of equity, if it is an equity case, we don't any more recite that; we just say the case is dismissed, but I believe that the exception to that is this dismissal for unclean hands, and that that is an important exception, because if a fraud has been perpetrated on the court, and particularly

a fraud of this nature, it is necessary in the public good that the order of dismissal shall show that it was dismissed for unclean hands, and my interpretation of the cases is that it is necessary that the order should so show, in order that everyone may be advised of the fact that that is the penalty which attaches to the perpetration of such offenses.

It should be recalled, borne in mind, that the doctrine of unclean hands is a purely equitable doctrine. It is not a defense—the courts have held that many times—in the ordinary sense of the word. It does not decide that the Dubbs patent is invalid or not infringed. It merely says that you have so behaved yourself, complainant, that you are not entitled to appear in a court of equity, because you appear in a court of equity as a grace rather than a right, to start with, and therefore the final decree which dismisses for that reason, the final judgment to be entered, should so recite.

I should like to advert for a moment to this question of whether the Supreme Court held that these proceedings were not adversary. The Supreme Court does hold, it seems to me, that the oil companies whom we represented were never properly before the court in the guise of adversary parties, but I revert to the proposition that the Supreme Court couldn't have held that the proceedings were not adversary in the ultimate sense of that phrase. In other words, there would be no sense to this language which I referred to, that the inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question, if, as a matter of fact, if parties settle, that ends everything that may be done in the case.

Judge Goodrich: I am sorry; I didn't hear what you said.

Mr. von Holst: I say, there would be no sense to that language of the Supreme Court that I read if, as a matter of fact, there is no power, in the parties having settled their case, there is nothing left to be done in the case, and therefore I say that the Supreme Court's decision must mean that the requirement of adversary parties is sufficiently satisfied if the question of fraud of this character arose in a judicial controversy, that no act of the parties could deprive the court of that power.

We should remember that in the Hazel-Atlas v. Hartford Empire case the parties had settled that case too, the only difference being that in that case the record defendant, without moving to set aside the settlement at all, instigated the investigation. In the Root case Root did not, but these others who were affected did, but here is a point on adversary parties that I think is well worth making. In the narrower ground in the last paragraph of the Supreme Court's opinion the Court tells us what is the proper procedure, in this sentence. It says:

> "No doubt, a court that undertakes an investigation of fraud upon it may avail itself, as did the court below, of amici to represent the public interest in the administration of justice. Compensation is not the normal reward of those who offer such services. After all, a federal court can always call on law officers of the United States to serve as amici."

Judge Biggs: Just right there, Mr. von Holst. Assume that this is not an adversary proceeding. Assume that arguendo.

Mr. von Holst: Yes.

Judge Biggs: Should we not require an adversary proceeding to be gone through with here, substituting the attorney general of the United States in lieu of amici?

Mr. von Holst: We were prepared to make that suggestion to Your Honors this morning. I have here a memorandum, of which I shall give a copy to the plaintiff's lawyers, Universal's lawyers, and I should like to hand it up after my argument, in which I call Your Honor's attention to the case of Marr vs. A. B. Dick—maybe you are already familiar with the case. That case was a patent case in which the plaintiff was successful and in which a petition for certiorari to the Supreme Court had been filed. In the meantime the United States had instituted a civil and criminal suit under the anti-trust laws, and in those proceedings had developed the fact that the plaintiff had entered into an agreement with certain other people to suppress information as to defenses of prior use which would have invalidated the patent—the same situation as in the Keystone Driller case—and the Solicitor General of the United States filed a memorandum as amicus curiae in the Supreme Court, suggesting that he was offering his services if the court should see fit to remand the case in order to hear proof on that question, and on November 12, 1946, Mr. Cropley, the clerk of the Supreme Court, informed counsel that the Supreme Court had entered the following order.

> "PER CURIAM: The petition for writ of certiorari is granted. The Judgment of the Circuit Court of Appeals is vacated and the cause is remanded to that court for consideration of the question, raised by the Solicitor General in his memorandum as amicus curiae, 'whether respondent's

prosecution of the instant case may not constitute a fraud upon the courts.' ".

Now, it seems to us that this is apparent: This court knows from having read the record—the Master knows—that this fraud was actually committed. Now, Universal is in position to say that could not have been proved if we had a fair hearing. We will assume that it is in position to say that. That is an unfortunate situation. If an offense of this nature was committed, and if, as a matter of fact, there was any deviation from the regular judicial procedure in ascertaining the fact of fraud, then something should be done to cure the record. So far as I know, Universal has only been able to point to one thing which it claims was an irregularity, and that was that prior to the proceedings before the Master, the Master went down to New York, to the Attorney General's office, and went through all the papers that had been collected by the United States Attorney in the Fox matter and in the Root matter, because the whole thing had been combed over before our proceedings were ever begun, and from that mass of papers brought those which he considered pertinent to the inquiry, and Universal argues from that that Mr. White may have seen documents which affected Universal favorably and didn't bring them, or in some way his mind may have been influenced by what he saw, and that Universal didn't see those papers, all the papers that the Master saw.

It seems to me the first answer to that is that that visit of the Master to New York was expressly consented to by counsel for Universal, as well as by amici, but there is one point. Now, assume that there are others. A rule to show cause could issue from this court, as suggested in our last letter to Mr. Rowland, the clerk of this court, call-

ing upon Universal to point out in what respects it had been injured, if any, and then there could be an initial determination by this court whether what Universal complains of amounted in fact to a deprivation of its rights or whether it was a mere nothing, and if the court should determine that Universal should have opportunity again to show its innocence by other machinery, whereby the question of due process, and parties, and so forth, could be entirely obviated, then that opportunity should be given; in other words, that this court should not rest under any imputation of unfairness, nor should it ever be said of this or any other court that conclusions were arrived at in a matter of this kind where it could be said that those proceedings in any way deviated from the regular proceedings obtaining in a court of law or equity.

Of course, we know, who attended before Master White, that everything was conducted with the utmost fairness, that Universal had full opportunity to cross-examine any and all witnesses, and exercised that opportunity.

Judge Kalodner: Such a procedure would be predicated upon the assumption that the original judgment had been vacated, that the judgment in favor of the Universal Oil Company had been vacated.

Mr. von Holst: Yes.

Judge Kalodner: Well, now, how can you possibly proceed on that assumption, in view of the Supreme Court's findings?

Judge Maris: They haven't set it aside.

Mr. von Holst: They haven't set it aside, as far as I can see.

Judge Kalodner: No, they sent it back to this court to set aside. In other words, didn't the Supreme Court return

the case to this court and say, "You vacated the original judgment in favor of Universal against Root. You had no right to do so. We are sending it back to you for an entry of judgment in conformity with this case"?

Mr. von Holst: I don't see it that way at all.

Judge Biggs: No, Judge, they didn't do that.

Mr. von Holst: I didn't quite get to the end of my recital of facts.

Judge Biggs: Suppose you proceed.

Mr. von Holst: After this June 15, 1944, order was entered, the amici then—I will say this, that the three-months' period elapsed and Universal took no petition for certiorari from that order. Then in November we appeared before this court on a petition for the allowance of fees and expenses, and that question was argued before the court *in banc,* and then on December 29, 1944, this court entered its order allowing the fees and expenses, allowing the Master's fees and expenses of some $28,000, other expenses of $54,000 and fees of $100,000. It was from that order that Universal took its petition for certiorari, and it is that order which is reversed. We looked at the mandates of the Supreme Court on file in the clerk's office this morning. It is the order of December 29 that is reversed.

Judge Biggs: Were there two petitions for certiorari filed?

Mr. von Holst: There were.

Judge Biggs: Will you explain the difference between those petitions?

Mr. von Holst: One was under the all-writs section.

Judge Biggs: Section 266?

Mr. von Holst: Yes.

Judge Biggs: Didn't that go to the prior judgment?

Mr. von Holst: Not that I know of, Your Honor.

Judge Biggs: What did the petition seek by the all-writs section certiorari?

Mr. von Holst: As to whether that is limited to the three-months' period?

Judge Biggs: Yes, the first point. What did they seek to review?

Mr. von Holst: The same thing.

Mr. Harris: May I tell you?

Judge Biggs: Yes.

Mr. Harris: There is considerable question as to which section was the appropriate one to apply for. We first applied for mandamus or prohibition. The court first denied that and in its denial said that it was without prejudice to the right to apply for a writ of certiorari. Then the question was whether it was the ordinary certiorari or the type of certiorari which would be more nearly akin to a prohibition or mandamus, and to be sure that we didn't fall between two stones, we made both applications.

Judge Biggs: Thank you.

Mr. Harris: They were both directed to the compensation order.

Mr. von Holst: Or stating it conversely, neither was directed to the June 15 order.

Mr. Harris: And both applications were granted.

Judge Biggs: Then the all-writs one was subsequently dismissed?

Mr. Harris: That is correct.

Mr. von Holst: That is why, in answer to Judge Kalodner's question I say that the only order that is affected by the Supreme Court is the December 29 order, and that the June 15 order is intact, not reached. Therefore, if an

order to show cause should issue it could be predicated perfectly well on the June 15 order, if necessary, but, as a matter of fact, it could be predicated upon the ascertainment by this court broadly of facts showing the strong probability of fraud having been committed. It certainly cannot be denied that the record before Master White would suggest to this court the necessity of proceedings, whatever they might be, looking to the ascertainment of that fact in a judicial proceeding, if none had thus far been held.

Judge Goodrich: I am in difficulty about those two suggestions of yours. You say the only certiorari was from the order allowing the fees and expenses, and so on.

Mr. von Holst: Yes.

Judge Goodrich: That everything else is left just where this court left it.

Mr. von Holst: Yes.

Judge Goodrich: Now, if the fees were not allowed, but the other order remains unimpaired, is there in this court any authority to do anything more than leave its 1944 order alone or make such other orders as are in accordance with, on the subject of fees, what the court wishes to do?

Judge Biggs: Restore it to the argument list. If it hadn't been automatically restored, the question is now, what shall we do with it? At least, that is one of the questions.

Mr. von Holst: As we see it, there are really two things that can be done. Our position is, as I have stated at length, that this court could summarily enter an order directing the district court to reverse its decree and dismiss these cases for unclean hands. That, however, has the disadvantage, and there is no use denying it, that Universal could always

voice the traditional lament of the culprit, "We was robbed. We didn't have a fair hearing."

Now, that thing can be scotched, and it seems to us that the machinery for scotching it is to adopt the suggestion of the solicitor general here,—call in the United States. The evidence has all been collected. It is all known now. Issue a rule to show cause on Universal, and proceed to further hearings if Universal can show cause wherein it was deprived of a fair hearing.

I might suggest this, Your Honors. I am now speaking with all the omniscience of hindsight. Supposing that prior to the argument before this court which led up to the June 15, 1944, order, we had suggested to this court that an order should issue out of this court on Universal to show cause why the judgments of June 26, 1935, should not be vacated and set aside for fraud. Supposing such an order had been entered even though nothing had been done under it. It seems to me that Universal wouldn't have been able to make any such argument as it did make in the Supreme Court.

Judge Biggs: I am not at all sure that it is obvious that you did not proceed in the right way. In view of the hindsight conferred upon us by the Supreme Court's opinion, I dare say that hindsight was still not better than foresight.

Judge Maris: Mr. von Holst, do I correctly gather that you regard this second suggested procedure as the more proper one?

Mr. von Holst: Yes, sir. I think the whole thing should go to the Supreme Court, where Universal should be able to say to the Supreme Court, "We were innocent," and then the Supreme Court can read the record and see whether

Universal was innocent, instead of being able to say, "Well, we never had a fair trial," never even being able to point out categorically where they were deprived of a fair trial, and that is the way the record could go to the Supreme Court on further proceedings, with a show cause order.

Judge Biggs: Mr. von Holst, does that conclude your presentation?

Mr. von Holst: I think it does. I should like leave to reply, if I may.

Judge Biggs: I think so, but let me say this: Mr. Harris, what is your thought? I think you are aware, of course, of the fact that Mr. Davis, representing Skelly, has been allowed a limited intervention here.

Mr. Harris: He has been allowed to argue his motion for a limited intervention.

Judge Biggs: That is what I meant to say. He hasn't been allowed to intervene. He has been allowed by order to present his motion.

Mr. Harris: I do understand that.

Judge Biggs: Would you prefer to defer your argument until he has spoken?

Mr. Harris: Your Honor, if you please, while Mr. Holst's argument is fresh in the mind of the Court, I would like to reply.

Judge Biggs: Very well. Then you may have an opportunity to reply to Mr. Davis.

Mr. Harris: Thank you, and my reply would be very brief on that. I have a memorandum of law which I can submit to the court, because the facts don't require any elucidation.

Mr. Harris: May it please the Court, I want to see if I cannot re-create the atmosphere of the position of these amici (amisi), or, as we used to call them before Mr. White, in order to differentiate them from amici (amisi), amici (amiki), to show their true position in this picture with respect to the so-called other oil companies. I may say parenthetically that when we got to the Supreme Court we were all so used to saying amici (amiki) that we both said amici (amiki), and the chief justice and Mr. Justice Frankfurter for a few minutes hesitated when they pronounced the word, and finally came out amici (amisi).

Now, Justice Frankfurter, on page 3 of this reprint of his opinion, put the amici in their proper place as a matter of law.

At the bottom of page 3 he says:

> "As a matter of law, however, their status was only that of *amici,* for their clients did not subject themselves to the court's jurisdiction. The relation of these lawyers to the court, after it recognized them as *amici,* remained throughout only that of *amici.*"

Now, Mr. von Holst, when we were before Mr. White —and let me parenthetically say to this Court that we have the highest personal regard for Mr. White, and nothing that we have said or done has ever been intended to be regarded in any way as a reflection upon him. He conducted the investigation, in our opinion, according to his concept of what he had been directed by this court to do, and when I shall read his language in a moment, you will see, as the Supreme Court did, that he thought he was conducting an investigation and not a judicial proceeding.

Now, before Mr. White—and any errors which Mr. White fell into, of course, were unintentional and only those that even the best judges sometimes fall into.

Judge Maris: Well, it looks as though perhaps we fell into some, too.

Judge Biggs: Mr. Harris, I think, is evading that very delicate thing.

Judge Maris: I said "perhaps".

Mr. Harris: The day that I came up to argue the exceptions I met Mr. White at the Union League at lunch, and he said, "I suppose by now you have found that I committed a great deal of error."

In any event, at the first hearing before Mr. White I was concerned about what the status of this proceeding was. If it were a litigation where these gentlemen were seeking to take our property away from us, then I wanted a trial. If, on the other hand, it was, as I thought it was, an investigation, as a result of which the court would accumulate a great many facts which could be used by the public prosecutor or private litigants or in any other lawful manner, whatever that might be, if it were in the nature of an investigation, then, of course, we wanted to cooperate in any way with the court, as Judge Haight indicated in the first hearing before this court in June or July of 1941. But I was concerned at the first hearing before Mr. White, and so I tried to get the matter cleared up by a series of speeches that I made and in colloquies with counsel and with Mr. White. When for example the matter came up as to whether or not witnesses called by the amici, who themselves asked that subpoenas duces tecum be issued, were to be treated as witnesses called by the amici, and therefore whether the amici would be generally bound by

them in the absence of a showing of hostility, or anything of that sort, I was immediately met with the proposition that no, they should not be regarded as witnesses called by the amici, that this was an investigation. So I made the following remarks and was met by the following answers. This is on page 172 of the record in the Supreme Court in connection with the all-writs application.

> "But it would seem to us that when counsel began to try a defense"—that is the defense of unclean hands—"an alleged defense to the Root case in this investigation of the Circuit Court of Appeals for the Third Circuit, we were justified in asking that they proceed in the same manner as if they were trying to sustain such a defense of an action.
>
> "Mr. Von Holst: May I speak to that, Your Honor?
>
> "The Master: Yes.
>
> "Mr. Von Holst: It seems to me there is nothing that has been suggested thus far in the proceedings of the Court of Appeals or in the proceedings before Your Honor that remotely suggests any issue of defense such as might have been interposed or could still be interposed in the Root case, and, therefore, I don't see the ground of the objection to the issuance of subpoenas. This is directed entirely to a matter in issue which is before Your Honor on this investigation."

Now, that made it pretty clear that they weren't trying the defense. I may say to Your Honors, you may wonder why we are spending time and money litigating here and in the Supreme Court. We did—at least the people who are now connected with the company and their attorneys did—attempt in good faith and to the utmost of our

ability to cooperate in what we regarded was an investigation made by this court of the relations between former members of the court and lawyers appearing before it and perhaps clients too, but we never on earth thought that we were going to find ourselves deprived for fraud of our property. We were willing to give up the judgments and reargue them. We are still willing to renounce them, although, as I shall show, it seems to me, under the clear implication of the Supreme Court's decision indicating what it would have held, had this question been before it, those judgments probably can't be set aside at all, even with our consent.

I will come to that later. We are perfectly willing effectively to estop ourselves in any way that is proper against ever asserting that we have judgments. We don't want them. Judge Haight said from the beginning that the moment the finger of suspicion was pointed against our judgments, we wanted to give them up and argue the case over again.

What we have been litigating, as Mr. von Holst has very cleverly either conveyed to you or concealed from you, I don't know which, is a series of private litigations which he has brought against us, in a group of cases that were consolidated into one action in Chicago, where his clients, the ones whom he says he acted for here, have sued Universal in the state court there for $1,700,000, being Mr. von Holst's and his partners' counsel fees, and other expenses of defending these Winkler-Koch cases. There he has pleaded the alleged facts which he says constitute the alleged fraud in the Root case, and the case is or will shortly be at issue. It is raised there in a plenary action. There is no question as to whether they have the right to

raise it. There is no question that we have the right to deny it. There is no question that the court is one of competent jurisdiction. It is a private quarrel. It has nothing to do with the proper anxiety of this court or the Bench and Bar of this state and circuit to clear its records of any association with an unfaithful judge and a faithless lawyer. It is purely private.

Mr. von Holst and Mr. Thiess have also brought an anti-trust suit on behalf of another client, the Winkler-Koch Company, which was the licensor or the engineer for their other clients, in the federal court of New York, asking some $15,000,000 damages. There again they allege the facts constituting the fraud, but they also allege—and it has been the subject of a motion to strike recently—they allege the fact that this court on June 15, 1944, set aside these judgments for fraud, and on the motion to strike recently Mr. von Holst's partner, Mr. Neuman, took the position that they would offer that order in evidence.

You all know that the Skelly Oil Company accounting case is still pending in Delaware. It has been for twenty odd years in litigation and, as I said, is now on the accounting phase. It has been suggested there, although that case has nothing to do with the patents involved in the Root case, that the incidental reference by Colonel Kingsland, who is patent counsel down there, to the opinion of Judge Davis, when Universal knew that it had bribed Judge Davis, was such a fraud as to vitiate that case ab initio, and that the complaints should be dismissed for unclean hands, and Universal should be required to pay all of Skelly's counsel fees for the last twenty years, which I understand amount to more than half a million dollars—fees and expenses.

That is another case. These are the things that I foresaw. I told Your Honors a little about them when we were here before. I told the Supreme Court a little about them, and I said to the court as I said previously to you and say again: All we want is an opportunity in a plenary action, where the rules of evidence are observed, and where there is a justiciable controversy before a competent court, to try out this issue.

We were, not intentionally but actually, we were deluded into adopting an attitude of disarming ourselves completely before Mr. White. I tried to argue before him and you that the evidence was all circumstantial, inferences piled on inferences, which didn't lead to the conclusion that he arrived at, but I was unsuccessful, and I was shocked and horrified at the result attained, and I may say that Universal's president, one of the witnesses in the case, the late Hiram J. Halle, just lay down and died of shame and humiliation as a result of that decision—within a few months thereafter.

I am getting a little far afield in my argument.

Again, Mr. von Holst on page 173 of the Supreme Court record says:

> "Perhaps I should further clarify the situation"—

This is at the first hearing before Mr. White, and it relates to the relationship of these oil companies which Mr. von Holst at this late date says really were parties before the court all the time. You will recall that while they did disclose that they represented certain oil companies, they filed their petition as amici.

Judge Biggs: At my suggestion.

Mr. Harris: At your suggestion. They were appointed amici. All their appearances before Mr. White were as amici. On all of their briefs and their papers filed before the Master was only the word "amici". All their arguments and appearances and papers filed in this court were as "amici", and then, all of a sudden, when we get a writ of certiorari from the Supreme Court, the nomenclature changes and it becomes J. Bernard Thiess and Thorley von Holst as amici curiae *pro se* and on behalf of Skelly Oil Company, et al, and then they enumerate them, and that was the first time, when we got to the Supreme Court, that they ever made a formal declaration on the outside of their papers that they were representing anybody except the good old public.

Judge Biggs: They did disclose it here. Judge Denison did and so did Mr. Thiess.

Mr. Harris: That is true. I am proceeding now, in the light of what I have given you, to read you what they said before Mr. White. One of the things they said is this:

> "Mr. Von Holst: Perhaps I should further clarify the situation—we have already done so before although Mr. Harris wasn't here—in this respect, that we do not represent the Root Refining Company, that is, by 'we' I mean the amici, in any situation which they might have, the Root Company having settled its case and not being represented in these proceedings either before the Court of Appeals or here, and we do not represent them."

I shall read you presently certain portions from the opinion of Mr. Justice Frankfurter, in which he found definitely, as a matter of fact and as a matter of law, that their clients had failed and refused to appear, and had not in

any wise submitted themselves to the jurisdiction of the court. Before Mr. White I even went so far as to make a joke about it. I said, "Why don't you come in here?" and I said, "I once heard it said by a country judge to someone who was not formally in the case, 'Either appear or disappear.' "

So it was emphasized all the way through, and so Mr. Justice Frankfurter said (p. 3):

> "As a matter of law, however, their status"—Thiess's and von Holst's—"was only that of *amici*, for their clients did not subject themselves to the court's jurisdiction. The relation of these lawyers to the court, after it recognized them as *amici*, remained throughout only that of *amici*."

Judge Biggs: Right there, Mr. Harris. That phrase which Mr. Justice Frankfurter has used, "their clients", I think that is the phrase, isn't it?

Mr. Harris: That is right.

Judge Biggs: What did he mean by "their clients"?

Mr. Harris: It is very simple. There is no question that they had had clients, and they disclosed that they had had clients in this other litigation.

Judge Biggs: Yes, but is the Justice referring to Root or some other group of clients?

Mr. Harris: He is referring to all of these. They will concede that he was referring to the Skelly Oil Company and all of their other clients exclusive of Root.

Judge Biggs: Exclusive of Root?

Mr. Harris: Well, Root was out on another ground. Either including or excluding Root, it doesn't make any difference.

Judge Biggs: I am not sure it doesn't. It sounds like a very small point. I am quite sure it is quite technical, but if the Supreme Court held that Root was not a party to these proceedings, then it certainly goes far to bolster the theory that it was not adversary.

Mr. Harris: Let me address myself to that. I wish we had a transcript of the hearing before the Supreme Court, because it would be most illuminating. A good part of Mr. von Holst's time, I regret to say, was taken up by inquiries from the court, and the first thing the chief justice asked him, the late chief justice asked him, was, "Well, now, tell me, did you represent Root in this proceeding?"

Mr. von Holst said, "Well, we did, after a fashion."

He said, "Did you represent them on that investigation?"

"Well," he said, "we had been their attorneys for many years. They had settled their case and they didn't want to reopen it, but we were there."

Then Mr. Justice Rutledge got after him. He said, "Did you give any notice to him?"

"Well," said Mr. von Holst, "I saw the president of Root on the street a short time before Judge Denison came into this matter in the Circuit Court of Appeals.

"Well," said Justice Frankfurter, "did you send them anything in writing?"

"No."

"Well, then," Mr. Justice Frankfurter said (having produced one of his famous *mots* in connection with my argument, and having asked me whether I conceded that at least there was a case or controversy in the Supreme Court, as to whether there was a case or controversy in this court). Mr. von Holst, recalling that *mot,* when he was driven

rather hard, said, "Well, I will tell you, we did have some authority. We had authority to appear in the Circuit Court of Appeals and say to the court that we had no authority to appear."

And that was the end of it, and the whole argument went off on the question of whether or not any of these clients of theirs was willing to submit itself to the jurisdiction of the court, whether there was ever any intervention or notice given to them, and whether, therefore, there could be a case or controversy.

Judge Biggs: Let me insert one other thought there before you proceed. Assume that Mr. Thiess and Mr. von Holst did not appear for Root, and assume also that there had been a fraud perpetrated on this court by the bribery of a judge, would you take the position that Root was not still before us, the parties were not still before us, so that the mandate could not have been vacated?

Mr. Harris: I am obliged to take that position as a matter of law, and I will elucidate it a little further later. I differentiate this case entirely from the Hartford Empire case. I don't for a moment contend that this court does not have inherent power to investigate whether or not a fraud has been perpetrated upon it, but when it comes to taking judicial action which affects the property, protected by the constitution and by law, of any party, including a successful litigant who is accused of fraud, and there is no longer any adversary proceeding before the Court, in my judgment the only civil remedy is an investigation.

It seems perfectly clear to me, assuming there are no parties before the court—if there are parties before the court, as in Hartford Empire, there isn't any question but

what the court can affect the property rights. It has the parties who were before it when it adjudicated those rights. It has those parties before it, and it can undo that. But the difficulty of it is that every federal court lacks jurisdiction unless there is a case or controversy under the constitution, as interpreted by the cases. And without exception, from the Muskrat case and the earlier cases right down to the last term of the Supreme Court, adversary parties have been held to be a prime and absolute requisite to a case or controversy.

Now, it may be very unfortunate. There are many other things, such as portions of the tariff that are thought to be unconstitutional, but they are political and can't be adjudicated, and here we have something that can't be adjudicated here, but can be adjudicated somewhere else. The oil companies can adjudicate it in their private litigation. Your Honors can turn it over to the district attorney, and you, of course, may discipline members of the court appearing before you for participating in a fraud—or members of the bar and perhaps members of the court—and you may lay before or make available both for public and private use the information which you gather. It may be most unfortunate, but it is perfectly clear from the Supreme Court's decision, as I shall show you presently, that we can't have any effective judicial action which affects property unless there is a case or controversy, simply because the court has no jurisdiction.

Judge Kalodner: What do you construe your status to be now?

Mr. Harris: I am here today in pursuance of two letters that I wrote to Mr. Rowland, following suggestions from him, in which I have indicated what I thought ought

to be done in the case, and to make a long story short, to get right to the heart of the matter, I am moving that the interlocutory order of June 15, 1944, be vacated.

Judge Biggs: Is this your formal motion?

Mr. Harris: I have formal motion papers which I haven't filed, because I thought, in view of the responses that both Mr. von Holst and I made to Mr. Rowland's letter, that perhaps Your Honors would want a discussion here such as you had before.

Judge Biggs: The papers should be filed in court today.

Mr. Harris: Yes, sir. It is a very simple motion.

Now, if I may proceed with my argument and get through as promptly as possible——

Judge Biggs: We don't desire to limit you on time. Mr. Davis has still to be heard, and you may want a reply, and Mr. von Holst may want a reply to that.

Mr. Harris: What time do you adjourn for lunch?

Judge Biggs: Ordinarily we recess by 12:30.

Mr. Harris: I think I shall be through by 12:30, if I may have that time.

Judge Biggs: We will recess and probably have to convene after lunch. Are you in a hurry?

Mr. Harris: No, sir.

Judge Biggs: Very well. You need not limit yourselves on time. We want to go into this as thoroughly and as completely as we can.

Judge Kalodner: I would like to pursue this just a little further. This court on June 15, 1944, vacated the original judgments of Universal?

Mr. Harris: The judgments of affirmance in this court.

Judge Kalodner: That is right, and then the case was to be reargued in this court. That is the status now?

Mr. Harris: That is the status now.

Judge Kalodner: Then the only thing to be done is for the court to hear the reargument in this case?

Mr. Harris: No, I am asking the Court to vacate the order in so far as it set aside these judgments for fraud, on the ground that, in the first place, the court was without jurisdiction to enter that.

Judge Kalodner: As I read this opinion, you undoubtedly would have won out in the Supreme Court had you appealed from the order of June 15. Did you construe that to be a final order?

Mr. Harris: No. That is the answer. After all, all that has happened is that the appeals are back in the position where they were before the argument in 1935. There has been no final disposition of the case at all, and so we did not go up and apply for certiorari because of two things: First, we thought the order was not final; second, having consented to the relief, although not to the characterization of the relief, we were afraid we might find ourselves in difficulty in the Supreme Court. In any event, while we were still considering the matter, and before the limitation had expired, this motion for compensation was made, and we felt that there, if that compensation were granted, was a final order which would necessarily test the validity of the order of June 15.

Now, the way we presented this to the Supreme Court was this: Obviously, if the court had no jurisdiction to take any judicial action in connection with setting aside the judgments, the court had no authority and power to grant counsel fees to lawyers who did that, and so, necessarily, there was involved, not for the purpose of reversing the order of June 15, 1944, but for the purpose of reversing

the order of December, 1944, a consideration by the Supreme Court of whether or not the foundation upon which that order rested, namely, the order of June 15, 1944, was valid. I shall attempt to show you in more detail that the Supreme Court has clearly held that it was not valid.

Judge Kalodner: What you want to do, then, is reargue our order of June 15.

Mr. Harris: No, I am moving to vacate it on the ground that the court had no jurisdiction to enter it.

Judge Kalodner: All right.

Mr. Harris: In my opinion, the order of June 15 was interlocutory and not final, and therefore there is no time limitation upon motions to modify or vacate. If, on the other hand, it was final, still there is a perfectly reputable body of cases holding that if it is a legal nullity, it can be vacated even beyond the expiration of time for appeal from a final order and judgment. Under my conception of the law, it falls within both of those categories, and certainly within the latter.

For the purpose of making the motion which I am now making informally and which I shall make formally during the day, with permission of the court, I would like to ask that it be understood that there is incorporated in the record for this purpose the entire record in the Root case and the entire record of the investigation up to date, by reference. Those papers are all in the office of the clerk of this court, and if I may regard those as being made part of the record, I have only one or two documents by which to supplement that record. The one was an agreement dated April 1, 1939.

Judge Biggs: I am not quite certain what you mean, Mr. Harris, when you say they may be regarded as part of the record. They are in the record.

Mr. Harris: I am now making a new record, because I am making a motion to vacate the order of June 15, 1944, and if it isn't necessary to make a new record, very well.

Judge Biggs: You make your motion based on the existing record. Are you now supplementing it?

Mr. Harris: I am preparing now to supplement the existing record by the introduction of two contracts, both contracts of settlement between Root and Universal, one dated April 1, 1939, and one dated July 28, 1944, and I should like to have those considered part of the record.

Judge Biggs: Is there any objection?

Mr. von Holst: None at all. We would be very glad to tie them in, and I would say they were put in by supplement in our brief to the Supreme Court.

Mr. Harris: They are in the Supreme Court record but not before this court.

Judge Biggs: I am not sure how you got them in there. How did you get them in there?

Mr. von Holst: We just tacked them on at the end of our brief.

(Laughter.)

Judge Biggs: You may present them as tacked on your motion.

(Laughter.)

(Photostatic copy of agreement dated April 1, 1939, between Universal and Root was marked Exhibit 1.)

(Photostatic copy of agreement between Root and Universal, dated July 28, 1944, was marked Exhibit 2.)

Mr. Harris: Well, I may say that that de facto method of procedure is effective sometimes, but that is one of our difficulties here. We have just done a little too much tacking on. I would like to untack a bit.

I may say, Your Honor, that the second agreement to which I refer, that of July 28, 1944, between Root and Universal, provided that the decrees of the district court in the Root case should be vacated and that the bills of complaint should be dismissed and that either party might enter an order thereon without notice to the other.

Judge Kalodner: What was the date of that?

Mr. Harris: July 28, 1944, after you had acted and also after the Supreme Court had acted in the Globe case, which held one of these patents invalid and the other not infringed.

We have refrained from entering the order in the district court, out of respect to this court, because we felt these matters were pending and that it would be the orderly thing not to try by a technical device to undercut whatever might be properly done here. However, unless the court requests us not to do so, we shall at some appropriate time in the future, perhaps even in the near future, enter that order. If the court prefers for us not to do so, we will be glad to refrain.

Judge Biggs: I don't think we should express any opinion in that matter.

Mr. Harris: It is out of great respect for the court that we have refrained from doing these things.

Judge Biggs: Judge Goodrich has expressed this thought: Apparently we should discuss it. If that is done, there isn't any case at all, is there?

Mr. Harris: That is right. That is out of your province.

Judge Biggs: In your view.

Mr. Harris: Yes. That is out of the court's province, but I don't want to solve it for you quite as easily as that.

Judge Biggs: Do you agree, Judge Kalodner, that we should express no opinion in that regard?

Judge Kalodner: Yes.

Judge Biggs: That is our present opinion.

Mr. Harris: Then we shall take such action as we are advised.

If Your Honors will permit me, I can make a shortcut to our conception of what should be done, by reading two letters that I have written Mr. Rowland, unless Your Honors have them very carefully in mind. They state very succinctly my position in these matters.

Judge Biggs: I don't have them carefully in mind.

Mr. Harris: I wrote to him on June 28, 1946:

> "Dear Mr. Rowland:
>
> "Further in response to your letter of June 20, 1946, I beg to advise as follows:
>
> "I am now in receipt of a copy of a letter to you dated June 25, 1946, presumably signed by Mr. Thorley von Holst, which was in reply, apparently, to a letter to him and Mr. Thiess from you similar to your letter to me of June 20, 1946.
>
> "In his letter to you, (1) Mr. von Holst suggests that the order of the Court of Appeals of June 15, 1944 is unaffected by the decision of the United States Supreme Court and that it would be

appropriate for the Court of Appeals 'to send down its mandate * * * dismissing the bill of complaint for unclean hands * * *', and (2) he apprises you of the proposal of himself and Mr. Thiess to file with the Supreme Court a petition for rehearing and to move the court for a stay of its mandate in the meantime.

"I yesterday conferred with Messrs. Thiess and von Holst in Chicago and was at that time advised of the contents of their letter to you."

I may say I was in Chicago on other business, and I saw them, and we discussed the matter.

Continuing the letter.

"While I assume that the Court of Appeals will not take any further action until the mandate of the Supreme Court is received, Mr. von Holst's suggestion is so at variance with what we believe to be the plain import of the decision of the Supreme Court, that it becomes important that I should take issue with Mr. von Holst's suggestion and submit mine at this time.

"It is true that the order of the Court of Appeals of June 15, 1944 was not the subject of an appeal to the Supreme Court. Such an appeal was not taken by us because we doubted our ability to do so since (a) Universal had consistently consented to the entry of an order setting aside the judgments and restoring them to the calendar for reargument, and (b) we doubted whether the order of June 15, 1944 was final.

"The subsequent order of the Court of Appeals allowing counsel fees and expenses was final and, hence, *certiorari* was granted by the Supreme Court with respect thereto. This latter order of the Court of Appeals depended for its validity upon the validity

of the order of June 15, 1944. As we see it, the decision of the Supreme Court regarded the order of June 15, 1944 (except in so far as it was consented to by Universal and that of course without any admission of fraud) as an order which the Court of Appeals had no jurisdiction to enter and consequently that order was a nullity.

"As recited in the opinion of the Supreme Court:

> 'Universal offered to consent to a reargument of the *Root* case and to preserve to the Root Company the benefits of the existing agreement, even if Universal should prevail upon reargument. Throughout these proceedings Universal stood ready to carry out this offer * * *.'

"With respect to the validity of the order of the Court of Appeals dated June 15, 1944 the Supreme Court, while recognizing the 'inherent power of a federal court to *investigate* whether a judgment was obtained by fraud' held:

> 'But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed. * * * But, obviously, a court cannot deprive a successful party [Universal] of his judgment without a proper hearing. * * * But if the *judgment could not be nullified* without adequate opportunity to be heard in a proper contest, neither is it just to assess the fees of attorneys and their expenses in conducting an investigation where petitioner throughout objected to the character of the *investigation* if it was to be used for a basis of *adjudicating* rights.'"

Is there any question in Your Honors' minds that I maintained in the most elaborate fashion of which I am

capable before the Master that he had no right to affect our property rights?

Maybe I better read just a page or two from that record. The first hearing——

Judge Biggs: Well, Mr. Harris, is it necessary for you to read that? I mean, after all, the Supreme Court has—speaking only for myself, it would seem to me that perhaps that question is included—perhaps you better read it. I am in a state of considerable confusion in this case.

Judge Kalodner: Did the Master say in his opinion that you had maintained that position in the proceedings?

Mr. Harris: That is right, but I would like for the Court to know how carefully I did do this. At the first hearing which I attended I said (pp. 164-6):

> "Mr. Harris: We construe the order of the Circuit Court of Appeals referring the matter to you, which order was dated November 26, 1942, as having for its primary purpose an investigation by the Court looking toward the vindication of the honor of the Court, or otherwise, as the case might be. Otherwise, as it seems to us, Your Honor is not a Master in a litigation but an investigator for the purpose of advising the Court of his conclusions and findings.
>
> "We welcome such an investigation. We will cooperate to the extent of our abilities, and wish to have the investigation as wide as possible.
>
> "To the extent that the amici curiae are really litigants, or to the extent that any finding by His Honor or by the Circuit Court of Appeals might affect property or other rights of Universal Oil Products Company, or in any wise affect the merits of the two Root cases, although we entertain in our own minds no doubt as to the propriety of every-

thing which has transpired and that will be duly shown, nevertheless, we feel we should be somewhat derelict in our duties to our client if we did not make upon the record an objection to the jurisdiction of the Circuit Court of Appeals, and, consequently, of Your Honor, to hear and determine in a summary and informal manner, and in a proceeding which doesn't amount to a controversy or suit prescribed by the Constitution of the United States, matters which affect or might affect property rights of our client and a judgment in its favor in the Court in this circuit.

"I should say in explanation of my remarks that if we are right on the question of jurisdiction, then, as we understand the law, it is not necessary to make an objection at this time, an objection to the jurisdiction of the subject matter may be taken at any time even on appeal, but I thought in fairness both to the Master and to counsel who are present for the amici curiae that I should attempt on behalf of our client to distinguish between what I regard as the function of the order of the Circuit Court of Appeals and what it might conceivably be attempted to be used for by counsel for the amici curiae who I understand are counsel for interested parties in other litigation, and therefore, purely for the sake of advising Your Honor and counsel, formally object in so far as this proceeding is other than an investigation by the Court looking toward vindication of the Court's honor, or otherwise; object that the Court is without jurisdiction to take testimony or to take any action, and that the order under which these hearings are held is likewise without jurisdiction, and without going into the details I urge that the investigation and order are not made in a case or controversy, as that case is defined in Sections 1 and 2, Article 3, of the Constitution of the United States.

"That there are not now before the Court or the Special Master any adverse parties so that any case or controversy can be said to exist.

"That there is not now before the Special Master any justiciable controversy over which the Circuit Court of Appeals or the Special Master has jurisdiction.

"That the persons designated in the order of the Circuit Court of Appeals herein as friends of the Court are not adverse parties technically, and have no standing as adverse parties in the cases of Root Refining Company, Defendant-Appellant against Universal Oil Products Company, Plaintiff-Appellee, Nos. 5546 and 5648."

And then a little further on I said—well, I don't believe I need to elaborate on this other than to say to you that at the conclusion of that argument the Master said (p. 177): "I do not think that the investigation—for that is all it is—should be conducted strictly according to the rules of evidence in litigation."

Judge Biggs: I think I recall that language now.

Mr. Harris: And it was upon that understanding that we unguarded, just gave them everything, and proceeded as if we were assisting an inquiry by the Court, which we were most happy to do.

With that understanding, I will continue, if I may, my letter to the Clerk.

"The Supreme Court stated that the question of whether the Court of Appeals could deprive Universal of its judgment was not before it 'except as it bears on the order allowing attorneys' fees and costs'."

Which, of course, means that to that extent it was before it. It can't mean anything else.

> "The Supreme Court then disallowed the attorneys' fees and expenses, except to the extent that Universal had, in the case of the Master's fees and expenses, appeared and participated in the *investigation* with acquiescing knowledge that the court would assess these."

Well, that merely meant that we had agreed informally that we would pay half the Master's fees or all of them if we lost, and they would pay them if we won.

> "That the Supreme Court regarded the proceedings culminating in the order of June 15, 1944 as lacking the indicia of a case or controversy is inherent in its decision and explicit in its statement of facts. For example, the Supreme Court stated that the moving attorneys 'expressed doubt as to the capacity in which they could formally make such a request of the Court', that their 'difficulty was due to the fact that * * * Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the lawsuit', that 'the other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case', that the moving attorneys 'could not move on their behalf to have the *Root* decree vacated * * *', and that the oil companies 'would not subject themselves to the court's jurisdiction and the hazard of an adverse determination.' "

Now, those are the facts found by the Supreme Court of the United States.

> "Under all of the foregoing circumstances, it is my opinion that the order of June 15, 1944 should be

resettled by the Court of Appeals. In fact, in strict conformity with the findings of the Supreme Court that it is a legal nullity, it should be stricken from the record but, since Universal has always consented that the judgments be set aside, we suggest that, although there is no adversary party who can give like consent, the order of June 15, 1944 be resettled to provide that the judgments of the Court of Appeals in the *Root* case be set aside 'upon the consent of Universal' and that, for the reasons hereafter appearing, the appeals be dismissed as moot.

"I suggest that the appeals are moot for the following reasons:

"Root made two settlements with Universal, one prior and one subsequent to the order of June 15, 1944. The latter settlement contains provisions" for vacating the decree below and dismissing the case.

"It thus appears that Root Refining Company can have no possible interest in further proceedings. Nor can the other oil companies have a further interest since the infringement suits against them,"—every one of them, with the exception of this Skelly matter which is already pending in another court—"against them, in which the plea of *res judicata* was set up by Universal, have all been dismissed."—on the merits by Universal, and that was done immediately following the determination by the Supreme Court in the Globe case that one patent was invalid and the other was not infringed.

There was no point in carrying them further. We dismissed every one of them on the merits, so that none of those oil company parties can possibly be adversely affected by a dismissal of the appeal.

And then I concluded:

"Under all of the foregoing circumstances, it is my judgment that the appeals actually are moot and that an order to that effect is appropriate. In the light of the decision of the Supreme Court it seems to me that this is the utmost which the Court of Appeals should seek to do, even with the consent of Universal.

"So far as directing Universal to make payment of the fees and expenses of the Master is concerned," I said it would not be necessary to enter a judgment, but that, if the other side would tell us the amount of it, we would send them a check.

Now, that is my first letter, and I want to say one further thing to Your Honors before I read my last letter, and that is that I don't take the position that we can wipe off the record the hearing before Mr. White or his findings or your overruling of our objections and your adoption of them. They are on the record and they are there forever, I assume. They are a stigma against my client, for what they are worth. They have no legal significance, I say, in that no judgment can be predicated upon them, but so far as the disgrace, the stigma, is concerned, they are there unless in fate's own sweet time we have an opportunity, under circumstances which we think would be more propitious, in private litigation to try our case and hope that it will come out the way we believe it should come out. In that event we may come back and at least ask you to file a copy of that judgment along with your findings in this court. Your Honors of course know that all of the people who might have been connected with the alleged fraud are dead. Mr. Halle is dead. Judge Haight is dead, Mr. Frank Belknap, who hired counsel is dead. Kaufman isn't dead, but the rest of them are dead. The company is now owned

for great charitable purposes. Its stock is held in trust for the American Chemical Society. It is operated as a charitable trust, and as you know, one of the things which this company does is conduct a great research laboratory in the physical and chemical field. It performs valuable services in engineering projects. Throughout the war it was one of the most important factors in the production of aviation gasoline.

Under the terms of the gift, the American Chemical Society uses the income, which is distributed by way of dividends, in turn for non-profit enterprises throughout the United States in the field of pure science, for the endowing of scholarships and professorships, and the carrying on of worth while scientific projects, with the provision they must all be non-profit and that any inventions arising from that research shall be dedicated to the American public royalty free.

It is an interesting innovation by one of these patent companies, some of which in some of their practices have been pernicious in the past, but which do perform a very valuable technical service to industry. I am hopeful, now that we have new officers, new directors, none formerly connected with the company, that this Court will not be astute to help these private litigants get the kind of a finding that some other Court will say is the law of the case on this issue of fraud, and that we may have an opportunity in plenary litigation by due process of law (because there isn't any question that the Supreme Court thought there were two defects here) to try out this fraud issue.

I say there is no personal criticism of Mr. White at all, but it was his conception of the way the thing should go, and then when the matter got before Your Honors, the

amici were able to persuade you that you ought to take some legal action based on it, which the Supreme Court has now said that you can't take. The order of June 15, 1944 ought to be vacated, first, because there was no due process, but beyond that, the whole thing is vitiated because there was no adversary proceeding, no case or controversy, and therefore this Court just didn't have the right to take any judicial action.

I am suggesting that you vacate the order. You would leave, necessarily, the findings of Mr. White and your affirmance of those. I think it is part of the inherent power of this Court to make those findings, even in an ex parte investigation such as this one, and to exhibit them to the world for whatever usefulness they may have, and so I have no hope, wouldn't have the nerve to ask you, to expunge those from the record, and they are there as a reminder to anyone that may be at large in the world, that that is what this Court does when something of this sort is called to its attention. Beyond that we think you are without power to affect our judgment. We are willing to give it up. We will give it up voluntarily. We will renounce it, and we want the appeals dismissed as moot, and then we will go down to the lower court and dismiss the case on this stipulation which I earlier read to you.

While the former management remains under the stigma, there are now new people in the company and they ought not to have to carry the onus of the old people. The name of the corporation hasn't been changed but it is just as if it were a new entity. We would like an opportunity to get over that, and I think we are getting over that reputation, and even the most hardened criminal—although we don't admit we are a criminal—is entitled to rehabilitate

himself. The company is a great public enterprise now. We want that opportunity; so on this ad hominem plea, I am asking you—while we don't ask to have the record changed so far as the findings are concerned—to follow what I believe is the law of the case and wipe out any possibility that these private litigants can come into the Circuit Court of Cook County, or into the United States District Court for the Southern District of New York, or down before the new district judge in Delaware, and have those courts say, "The Circuit Court of Appeals says you committed fraud, and that is a binding adjudication, and that is all I need. I will find fraud right now. You don't have to prove it at all."

All we say is, make them prove it in order to sue us privately. They are here pro bono publico. They did a good hard conscientious job—I don't agree with the result—but there is no reason why they should be rewarded in their private litigation for doing that. That was a public service, as the Supreme Court says, and they shouldn't get paid for it in money or in a finding to help them collect some $15,000,000 on some private claims.

Judge Biggs: You are about to go into your second point, are you not?

Mr. Harris: Yes.

Judge Biggs: The court will stand in recess until 1:45.

(Recess 12:35 P. M. until 1:45 P. M.)

AFTER RECESS

Present: Counsel as before noted.

Judge Biggs: Mr. Harris, proceed, sir.

Mr. Harris: Your Honors, this morning Mr. von Holst in his argument characterized the first or broader ground of Mr. Justice Frankfurter's decision as entirely hypothetical; or, as the late President Roosevelt might have said, an iffy decision, and he characterized what Mr. Justice Black called the narrower ground, what Mr. Justice Frankfurter called the narrower ground, as the only basis for the decision.

Well, it so happens, aside from the inherent unlikelihood of that construction, that, reading the opinion, we have something which I think is very effective.

Just before the recess I read you my letter to Mr. Rowland, following upon the heels of the decision of the Supreme Court of last June. That letter was received by Mr. Rowland, and I sent a copy of it to Mr. Thiess and Mr. von Holst. At that time a petition for rehearing had been filed by the amici. Instantly upon receipt of my letter Messrs. Thiess and von Holst rushed into print again by way of a supplement to petition for rehearing, and that supplement consisted entirely of reproducing my letter to Mr. Rowland which I read you this morning, plus their letter to Mr. Rowland, with these remarks:

> "Inasmuch as Universal's letter takes the unequivocal position that this Court's opinion of June 10, 1946"—Supreme Court's opinion—"holds that

> the order of June 15, 1944 is a 'nullity', we respectfully submit that this letter in itself furnishes a cogent reason for granting the petition for rehearing."

The petition for a rehearing could not thereafter have been denied any more promptly than it was, on the very date when the Supreme Court first handed down decisions; and I may say that, in spite of the fact that a stay of the mandate was requested of Mr. Justice Frankfurter by the amici, that stay was denied, and so the mandates came down from the Supreme Court to the Clerk's Office in this Court even before the motion for rehearing was denied.

Of course, that does not mean that the Supreme Court passed upon everything in my letter, but it certainly does mean that they hadn't decided that first ground on an iffy basis, because it was a discussion of that broader ground that was the whole basis of my letter, and had the Supreme Court been discussing mere theory and not something as applied to this case, then indeed these gentlemen would have stated a very cogent ground for a rehearing.

In October of this year, again at the request of the Clerk of the Court, both Messrs. Thiess and von Holst and I responded again, and I will be almost through when I read this letter to you. This was dated October 18, 1946.

> "Dear Mr. Rowland:
>
> "I am this morning in receipt of a letter dated October 16, 1946 addressed to you and signed by Messrs. J. Bernhard Thiess and Thorley von Holst.
>
> "For the information of the Court, I enclose herewith printed copies of the Petition for Rehearing and Supplement to Petition for Rehearing addressed to the Supreme Court in the *Root* matter by Messrs. Thiess and von Holst. As you are advised

by them, and probably now by the Clerk of the Supreme Court, the motion for rehearing was denied on October 14, 1946.

"In response to your letter dated June 20, 1946 sent both to Mr. von Holst and to me, Mr. von Holst responded under date of June 26, 1946 and I responded under date of June 28, 1946. In my letter I attempted accurately and conscientiously to interpret the opinion of the Supreme Court in the matter. Upon receipt of a copy of it, Messrs. Thiess and von Holst reproduced it along with your letter of June 20, 1946 and their letter of June 26, 1946 in the enclosed Supplement to Petition for Rehearing and submitted it promptly to the Supreme Court for consideration in connection with the Petition for Rehearing.

"By way of introduction to the letters, Messrs. Thiess and von Holst in their Supplement stated,

> " 'Inasmuch as Universal's letter [dated June 28, 1946] takes the unequivocal position that this Court's opinion of June 10, 1946 holds that the order of June 15, 1944 is a "nullity", we respectfully submit that this letter in itself furnishes a cogent reason for granting the petition for rehearing.'

"The argument that my letter of June 28, 1946 did not properly and accurately interpret the decision of the Supreme Court was thus squarely put before the Supreme Court as a ground for rehearing. The denial by the Supreme Court of the Petition for Rehearing, therefore, leads to but one conclusion, namely, that the Supreme Court found no inconsistency between its opinion in the *Root* matter and my interpretation thereof set forth in my letter of June 28, 1946. It seems to me, therefore, that the Court of Appeals should unquestion-

ably regard that matter as having been determined by the Supreme Court.

"In view of the foregoing, it is not necessary, at least at this time, to enter into a prolonged response to the suggestions contained in the present letter of Messrs. Thiess and von Holst to you dated October 16, 1946."

And that was the suggestion which was elaborated in Mr. von Holst's argument this morning suggesting that somehow or other this lack of due process could be patched up or doctored up by orders to show cause and opportunities to make objections and finding out what was in Mr. White's mind, and all that sort of thing.

Continuing with my letter:

"Suffice it to say that the Supreme Court did hold that the order of June 15, 1944, in so far as it should be deemed to affect the property or rights of Universal, denied Universal due process of law and was not entered in an adversary proceeding."

And it was necessarily so because the validity of the order for compensation depended upon the validity of the order of June 15. That is the broader ground of the decision of the Supreme Court.

"There can be no doubt that the Supreme Court has held that the proceeding was not adversary. It was an issue sharply argued in the briefs before it and constituted the greater part of the discussion between the Bench (particularly the late Chief Justice Stone, Mr. Justice Frankfurter and Mr. Justice Rutledge) and Mr. von Holst upon the argument. Furthermore, in the opinion Mr. Justice Frankfurter says that the 'difficulty [of amici] was due

to the fact that * * * Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the law suit', that 'The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case',".

I would like just to digress at that point for a moment to say that although the interests of these oil companies, not in a legal sense, but the fact that they took a lively interest in the proceedings was discussed, and although Messrs. Thiess and von Holst indicated that they represented them, there never was any move made to bring them under the jurisdiction or authority of this Court. It was really a heads I win tails you lose proposition. They kept out of the case—and my quotations from the record this morning should indicate that clearly—until they had these findings of fraud and the judgments set aside, whereupon they boldly began to maintain and have maintained ever since that somehow or other their clients were de facto under the jurisdiction of the Court, but the colloquy with the Supreme Court smoked them out to the point which resulted in these findings by the Supreme Court which I now read.

". . . that 'The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case', that the moving attorneys 'could not move on their behalf to have the *Root* decree vacated * * *', and that the oil companies 'would not subject themselves to the court's jurisdiction and the hazards of an adverse determination'.

"The procedure suggested by Messrs. Thiess and von Holst would, of course, fly precisely in the

face of the holding of the Supreme Court. There would still be no adversary parties before the Court . . ."

And I may say that the intervention today would not cure that defect, because Skelly Oil Company has no interest in the subject of the litigation between Root and Universal, which is the only controversy with respect to which they could be adversary, and in so far as the fraud litigation is concerned, that is a brand new issue arising after judgment, and, of course, under the cases, unless there is independent ground for federal jurisdiction, they could not even be permitted to intervene if the Court wanted them to, because both Skelly and Universal are Delaware corporations and there is no diversity of citizenship. There are plenty of cases on that.

> "There would still be no adversary parties before the Court and, consequently, no judgment affecting the rights and property of Universal could be entered. Furthermore, due process having been denied in the making of the record, that omission could not be cured by permitting Universal to present objections to bits of the record already made or to offer supplements thereto while leaving the record already made otherwise intact. The very vice which the Supreme Court pointed out would thus be perpetuated.
>
> "Only in a true adversary proceeding where a record is made in a court of competent jurisdiction in conformity with 'the usual safeguards of adversary proceedings' can that issue be determined against Universal or its property or rights."

Or in its favor, I might add.

"It is respectfully suggested that the request by Amici for further consideration by this Court is merely another endeavor to utilize this Court as an instrument for the private gain of the private clients of Amici. After the entry of the order of December 29, 1944 and prior to the decision of the United States Supreme Court in this matter, Amici, as attorneys for private interests (as well as Arthur Logan of the Delaware Bar who claims to be one of them) commenced litigation against Universal Oil Products Company in Illinois, Delaware and New York. The aggregate damages claimed in these actions are several million dollars. In each of the actions the alleged fraud of Universal in connection with the *Root* case is made the cornerstone or one of the cornerstones for plaintiffs' alleged right of recovery. In view of the Supreme Court decision it is apparent that plaintiffs in these actions, in order to succeed, must there establish the fraud which they allege. Amici as attorneys for private interests should be left to the plenary suits already instituted and Universal should be permitted there in litigation conducted according to the requirements of due process of law to endeavor to vindicate its integrity.

"The suggestion of Messrs. Thiess and von Holst with respect to the matter being moot is contrary to our suggestion. We did not suggest that the case 'be dismissed as moot' although that is the very remedy which Messrs. Thiess and von Holst earlier suggested to this Court shortly after the entry of the order of June 15, 1944.

"I suggested that the *appeals* be dismissed as moot, for the reasons set forth in my letter of June 28, 1946. This seemed appropriate not only in the light of the opinion of the Supreme Court but in

view of the provisions of the order of the Court of Appeals of June 15, 1944 setting the appeals down upon the argument list. Obviously, those appeals are moot since (a) Root and Universal have settled their controversy, (b) the Egloff patent has been held invalid by the Supreme Court, (c) the Dubbs patent expired more than six years ago, and (d) the actions in which Universal set up the Root judgment as *res adjudicata* have all been dismissed with prejudice."

"So far as the payment of the Master's fees"—and then I continue the offer to make those payments voluntarily.

Now, Your Honor, in the light of these letters and of the discussion and of the various matters which I have read and called your attention to this morning—and I have read those letters in extenso, although it is a rather uninteresting way to present an argument, simply because it is a little quicker than elaborating on them on my feet extemporaneously—I would like to consider with you just for a moment on page 5 the critical paragraph of Mr. Justice Frankfurter's opinion to which Mr. von Holst addressed himself so elaborately this morning.

We should bear in mind the difference in the facts between the Hazel-Atlas case and this case and the difference in the outcome of those cases in the Supreme Court. In the Hazel-Atlas case the parties were still parties to a litigation, a judgment, though it was long since concluded in this court.

The fraud was in the record in that case. There was no real controversy of fact. Indeed, when the case got to the Supreme Court, as you will remember particularly, Judge Biggs, I am sure, where the inherent power of the

Circuit Court of Appeals to investigate fraud practiced upon it was discussed, there is a footnote which says that the Court does not pass upon the question as to whether, if there were a contested question of fact, the Circuit Court of Appeals would be mechanically equipped to determine that or whether it should be sent back to the District Court for determination. But in that case there was a question of law. There you had a record, and as a matter of law this Court determined that a fraud had been practiced upon it—rather, a minority of the Court did—a majority of the Court following the older decisions. And Judge Biggs' position was made the basis of the majority opinion of the Supreme Court.

We did not maintain before you and we did not maintain before the Supreme Court that this Court does not have inherent power to investigate a fraud practiced upon it. The only thing we are concerned with is what legal significance can be given in this court to such an investigation.

As opposed to the Hazel-Atlas case, where there were no contested questions of fact and where the parties were before the Court, we have here a case in which the Supreme Court held there are no adversary parties, and where the facts were not only not admitted and not a matter of record, but they were bitterly contested, and where the matter was treated by the Master and by all of the lawyers appearing before the Master as an inquisitorial proceeding, an investigation. It was called that in Your Honors' order.

I referred to it and made objections to any proceeding being other than an investigation, and Mr. White himself called it an investigation. Besides this, the Supreme Court

found there were no adversary parties. So it couldn't have been anything but an investigation.

Now, the error that Mr. White fell into was a perfectly natural one. He regarded it as an investigation and therefore acted informally. He went around and looked at papers in the District Attorney's office, and he examined the files of the Grand Juries both in New York and in Philadelphia. He brought down to the hearing such papers as he thought were material to the inquiry.

I don't attack Mr. White's judgment, his competence, or his good faith. I told him in one of these hearings that it is perfectly all right, so long as it was an investigation, for him to go and inform himself independently; that, as a matter of fact, as far as I was concerned, he didn't even have to call some of these witnesses; he could ask Judge Morris to come to see him privately and talk to him about the whole case, and that was the way and the spirit and atmosphere in which this proceeding was carried on for a long time.

Now, the error, it seems to me, was that what everybody agreed was an investigation and what was treated as an investigation then all of a sudden, without any parties, and with lack of due process in the conduct of the hearing, became the subject of a motion to vacate our judgments. That is what the Supreme Court said could not be done. It said it wasn't before it in this case, but if it hadn't decided that issue collaterally, it could not on the broader ground have denied this compensation. It didn't deny the compensation, on the broader ground, on the theory that these gentlemen hadn't worked hard or that they weren't entitled to something; it was on the ground that there was no case or controversy before the Court, that no effec-

tive judicial action could be taken in this particular matter, and that therefore these lawyers could not be paid for their work.

Now, with these distinctions between Hazel-Atlas and our case in mind, I would just like to read this last paragraph of Mr. Justice Frankfurter's opinion (page 5) and see if it does not all fit in. And will you also bear in mind all of those findings of fact with reference to the nonintervention of the parties, which precede this paragraph, which is the ultimate digest of the whole decision.

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." Citing Hazel-Atlas.

That was on the facts in Hazel-Atlas. That is perfectly true. Nobody denies it. We all have agreed to it and so conceded.

Continuing apparently with the Hazel-Atlas case, so that it would be perfectly clear that the Supreme Court in reversing our case was not in any wise carving into the very salubrious doctrine enunciated in the Hazel-Atlas case:

> "The power to unearth such a fraud"—the kind of fraud the Hazel-Atlas case would come under—"is the power to unearth it effectively."

What unearthing a fraud effectively may mean, I don't know. One can't tell precisely in every case in advance. In Hazel-Atlas it consisted of setting aside the judgment. In our case I say that you couldn't set aside the judgment, and I say the Supreme Court has found so because it denied compensation on the ground that that order was based upon an order which you had no jurisdiction or authority to enter.

To unearth it effectively in our case might be, as I indicated this morning, to discipline members of the bar appearing before you and participating in it; possibly to discipline members of the court.

Judge Biggs: I think I follow your argument perfectly up to one point, and there it seems to me it doesn't fit in, Mr. Harris. Perhaps you can throw some light on it. You took the position earlier and adhered to that position absolutely consistently, I think, that though this Court might investigate, none the less, the judgment rendered by the Court of which Judge Davis was a member was in effect nailed to its head. It seems to me you have to go that far.

Mr. Harris: I do go that far. In this particular case.

Judge Biggs: In this particular case. You even took the position, assuming fraud, that it be so nailed.

Mr. Harris: Quite.

Judge Biggs: Now, here you have to say and you are saying that the Supreme Court in Hazel-Atlas, where there were adversary parties, clear adversary proceeding, could take effective action.

Mr. Harris: Yes, sir.

Judge Biggs: There are two points. The only effective action, the only action that could be considered really effective, would be a dislodgment of the effective judgment, I would think; and, secondly, if that is not the case, what could be effective.

Mr. Harris: Well, I was addressing myself to that, Your Honor.

Judge Biggs: Very well.

Mr. Harris: For one thing, the Court might punish or discipline members of the bar or members of the court.

Judge Biggs: Would that be effective? The judgment would still be extant.

Mr. Harris: I would think it would be pretty effective if I was disbarred, if I had been the agent through which the fraud were committed.

Judge Biggs: The fraud would still be against the party.

Judge Maris: That would be exemplary, but it wouldn't be effective in the particular proceedings.

Mr. Harris: The Court doesn't say, "You can take effective action." It says, "You may unearth it effectively." In other words, you may carry on an effective examination of the facts.

Now, the difficulty is in the federal constitution. The federal courts are only permitted to adjudicate where there is a case or controversy, and that was the whole question in the Supreme Court. We didn't argue about the value of these services.

Judge Biggs: I think I grasp your argument exactly, but let me make sure that I do. Suppose there was not the slightest question that a verdict was arrived at by a bribed jury; say a completely corrupted jury. Say that every member of the 12-man jury was bribed. Assume also that the Court was bribed, the Judge was bribed. They render a verdict in favor of the defendant.

Mr. Harris: There being no plaintiff.

Judge Biggs: No, I am assuming—quite true—but that is the very point that I have in mind. You don't say that if there were parties, that the Court wouldn't have power—

Mr. Harris: Certainly not, not for an instant.

Judge Maris: Suppose there are parties, and then subsequently a verdict is rendered for a sum of money, and that it is rendered through fraud, which appears clearly

later on, but at the time the judgment is rendered the defendant pays it and pays in full and goes about his business and forgets it entirely, then it appears. You say the Court at that point is powerless to do anything about it?

Mr. Harris: I will tell you how sharply that came up in the Supreme Court. Mr. von Holst was arguing the converse of that, and the Chief Justice—you will remember he had a great faculty for getting right at the heart of these things—he said, "Now, didn't Universal settle with Root?"

"Yes."

"Wasn't it a satisfactory settlement?"

"Yes."

"Would they come here today?"

"No."

"Well, suppose they don't want this judgment upset? They are satisfied with it. They have made a deal."

That is what the Chief Justice of the United States said.

Judge Maris: Your understanding of the Supreme Court's view, or his, at least, is that at that point the court is powerless to do anything, the parties being entirely satisfied with the soiled judgment, so to speak?

Mr. Harris: Certainly. The Court can vindicate its honor. It can clear its record. You have a finding here on the record forever, for all time, but the parties are satisfied with what has happened. As a matter of fact, the last settlement was made in the light of your setting aside of the judgments.

Judge Biggs: Mr. Harris, I am still not clear. I must be clear on this point. Let me state it very simply and as plainly as I can. Assume adversary parties, as in the Hazel-Atlas case. Assume a corrupt judgment obtained

by corrupting the court. Then assume a settlement, complete and absolute, between the parties.

Mr. Harris: With the knowledge of that fraud.

Judge Biggs: No, leave out first the knowledge of the fraud. Just assume the settlement. Would you then say there was no controversy over which the Court had jurisdiction?

Mr. Harris: I would, but I would say this. I would say there the party who had been defrauded, who had been beaten as a result of the fraud practiced upon the Court—we are assuming all the time that this is a fraud practiced upon the Court——

Judge Biggs: Yes, that is right.

Mr. Harris: ——would have had the same right that Root would have had in 1941. It could have said, "Our attention has been called to the fact that you bribed the judge and induced us to enter into this settlement with you. We give you notice hereby that we rescind for fraud."

They then could have come into this court and said, "We are now parties to this case," and we not only offered to let them come in and be parties, but we said, "If we win, you can have the same settlement."

Judge Biggs: But you say if they don't say that, sua sponte the Court could take no action?

Mr. Harris: The Court sua sponte cannot set aside the judgment. It can unearth the fraud. It can make it available to the parties. It can make it available to the District Attorney. It can smear the fraud upon its records by having this stigma for them there which is here, but I say that when you are in a federal court, unless there are adversary parties, there is no case or controversy, and whether it be fortunate or unfortunate—I don't argue that

—there is just the lack of ability to take effective action beyond telling it to the world.

Judge Goodrich: Or any individual punishment.

Mr. Harris: Or any individual punishment, yes, sir.

Judge Maris: In other words, your thought is that if that settlement had been effected as it had been done here originally, but upon the unearthing of this situation the party who had settled came in and said, "That was put over on me, and I assert my right to have this set aside," then there would be a controversy?

Mr. Harris: Of course there would.

Judge Maris: But if they said, as they did here, "We are still satisfied. We have no controversy, no quarrel of any kind," then you say there is no adversity?

Mr. Harris: Certainly. That is what the Chief Justice said. These people, even in the light of everything the Circuit Court has said, prefer their settlement.

Judge Biggs: Would you think, Mr. Harris, that we could find, on the state of the record, that Universal is guilty of contempt and impose a fine?

Mr. Harris: I am not prepared to answer that question, because I have never had anything of that sort come up. I rather doubt that, because, again, there would have to be a case or controversy.

Judge Biggs: Let us assume arguendo that there wasn't any controversy here; there wasn't any adversary proceeding. Just assume that. None the less, assume also that there is reasonable ground by which the Court can be suspicious of the judgment. Then assume further that there are further proceedings, not based on the old one, but a new proceeding, and your client is found guilty of contempt of court, and assume that Mr. X, their counsel,

who is not present, is also guilty of contumacious conduct. Certainly you would have the power to punish him.

Mr. Harris: Unquestionably you would have the power to punish him, because he is an officer of the court, and your control over him does not rest upon the constitutional requirement of a case or controversy. Now, in the case of the client, certainly if some contempt—and I have never had a contempt case in my life, and I am just trying to remember some of my old law school theory, so please forgive me if I go way off the track.

If the contempt were committed in the sight of the Court, where the matter was immediately and contemporaneously called to the attention of the Court, I think the Court would not be powerless to punish, but at that moment, the moment that was done, there would be a case or controversy, and the matter, of course, would be handled before the case was settled. Now, if you learn at some later date, am I not right that that would have to proceed by indictment or criminal contempt?

Judge Maris: Any contempt, on that theory, would be contempt that was committed back at the time this case was being litigated before the Court?

Mr. Harris: If it constituted contempt, that is one of the things I said, that the matter could be reported to the United States Attorney, and if a crime had been committed, of course, the Court has jurisdiction once an indictment has been handed up.

Judge Biggs: I don't know the answer.

Mr. Harris: I don't know the answer either, Your Honor. I have a feeling that it would not go quite that far —far enough to authorize you to set aside the judgment and summarily fine the client because as a result of some

investigation where it has been held that due process of law was not involved and you didn't have any jurisdiction anyway, some Master has found fraud and you are persuaded that he is right, that there was a fraud.

Judge Maris: Mr. Harris, it seems to me that it may be analogous to a situation of bribery of a jury. I don't know whether corruption of an officer of the court is not only a crime under the penal code and indictable, but whether it is also contempt of court and punishable as contempt.

Mr. Harris: I will be glad to look that up.

Judge Biggs: I don't think that Mr. Harris is concerned about what might happen in a contempt proceeding. It is clearly barred by the statute of limitations, under the opinion of the Supreme Court in the Michaels case. I didn't mean to imply, Mr. Harris, that I personally was thinking of instituting a contempt proceeding.

Mr. Harris: I didn't assume that you were.

Judge Maris: Mr. Harris, the question of controversy would not come in there because the contempt would grow out of the situation when there was a case.

Mr. Harris: That would be so, but still, Judge Maris, you don't quite get my point. If you find the contempt as a result of some findings of a Master who functioned in this extrajudicial fashion, and in a matter where the Court has no jurisdiction found fraud, I don't think that his findings would have any more effect than if the Marshal stood up here and said, "I hereby find Universal guilty of bribing Judge Davis."

Judge Maris: You are tying it into this particular proceeding?

Mr. Harris: Yes. If you are asking me whether you could start a contempt proceeding, that poses a different question and I am not prepared to answer it.

Judge Biggs: I think probably my question was devious in the first instance. It certainly is not an effective test here. It is based on an entirely different legal principle. The contempt was committed back when this was first heard, and it is barred by the statue of limitations, so that is that.

Mr. Harris: I am sorry I couldn't answer it.

Judge Biggs: I don't know the answer. What else is there now?

Mr. Harris: Just to sum up, and I think, as a matter of fact, I have summed up: I have suggested that the order be vacated, at least in so far as it set aside the judgment for fraud. Perhaps you will leave that part of the order which approves Mr. White's findings; that the appeals be dismissed as moot; and I hereby so move, there being no parties.

Judge Biggs: You will file your motion now?

Mr. Harris: I am filing a motion to vacate the judgment, and I am filing a long form order, proposed order, which provides for the vacation of the judgment, the dismissal of the appeals as moot, and permission for us or approval of our discontinuing the case below on the settlement of the parties.

Judge Biggs: I am not sure that we should make any instruction in respect to that last.

Mr. Harris: All I wanted was to be sure that you had no objection to it.

Judge Maris: Whether the appeals are dismissed would be wholly up to this Court, wouldn't it?

Mr. Harris: Quite, and, of course, this would necessarily involve a new mandate.

Judge Goodrich: If the appeals are dismissed, it no longer is our affair, is it? It would be a matter for us to suggest to the District Attorney.

Mr. Harris: I think it would, although you have withdrawn the mandate. Now, if you dismiss the appeal, doesn't that require, as a matter of practice, another mandate? That was what I had in mind.

Judge Biggs: You are filing these papers, and copies have been furnished, I take it, to the other side?

Mr. Harris: I don't recognize Messrs. Thiess and von Holst as being legally entitled to it, but I am happy to give them copies.

Judge Biggs: Very well. The Court will be happy to have you give them copies.

Suppose we hear your reply, Mr. von Holst, before we come to Mr. Davis.

Mr. von Holst: If that is agreeable to Mr. Davis.

Mr. Davis: Yes.

Mr. von Holst: May it please the Court, I shall be very brief. I would think that it would require the eloquence and legal ability of a Daniel Webster to adequately refute the iniquitous doctrine that I heard propounded this morning and afternoon on behalf of Universal.

I say "iniquitous" and I mean it. It says this, that in a case or controversy that arose within the constitutional definition, a fraud was committed in the bribery of a judge of the Court of Appeals, and no one questions but what at the time there was a case or controversy pending; no one questions but what that bribery was committed for the purpose of influencing judicial judgment and that it

succeeded; no one questions that at that stage of the case, if the fraud had been discovered, this Court could have set aside those judgments—not only could have, but would have—but it is suggested that if the parties themselves to that controversy, private citizens of the United States—I will put a strong phrase on it, without meaning to impute any misconduct to Root, which is a corporation and has its duty to its stockholders—but I say if two private parties in that situation then, for lack of any moral sense, agree to condone that fraud, that bribery of a judge, and the aggrieved party accepts a sum in settlement, then that iniquity, the fraudulent judgment of a Court of Appeals, of a federal judiciary, must stand for all time because the Court that entered it is impotent, powerless.

Let us just look for a moment at the implications of such a doctrine. That would mean that in a like situation here, if Universal learned shortly after the commission of the fraud that Root was on its trail, that facts had been discovered, that Kaufman's relationship to the case had been discovered, then all that Root would have to do would be to go to Universal and say, "Now, here, look at what we have got," and all Universal would say is, "I know you have got me cold. How much?"

So many million dollars.

"Settled."

And that is the end of it?

I cannot believe, Your Honors, that that can be the law of this land. I refuse to believe that that is implicit in the Supreme Court's opinion or that it is even hinted at in the Supreme Court's opinion.

That argument was made in the Supreme Court, it was made in the briefs in the Supreme Court, that because of

Root's settlement, the Court was powerless to act, and the Supreme Court's reply to it is on the top of page 5:

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question."

Not contingent upon the acquiescence, the permission, the say-so of a private litigant for it.

It seems to me, if the Court please, that that question should be forever laid at rest, even if it is necessary that this whole thing be done over again in order that another record may go to the Supreme Court, which should be done, and it should go to the Supreme Court. Certainly, I don't think that the average person reading that opinion, the average lawyer or judge, would read any such implication into it. The fact is it has been proposed that that is what the Supreme Court intended. It should not be an intention, an implication, or an inference. It should be in black and white, if that is to be the law of the land.

I might say that I think the Court should be governed by what the Supreme Court says in its opinion, and not by what occurred at the argument before that Court, because as you all well know, the Supreme Court likes to take lawyers and argue back and forth, as does any court, and explore possibilities. Now, the particular exploration on the part of whether Root had settled and whether Root was complaining, I submit to Your Honors, was on the question of whether Root was rightfully notified of these proceedings; that if it had not been rightfully notified of these proceedings, then it might have something to say before the Supreme Court on the question of whether this settlement should be upset, and I represented to the Supreme

Court, as we amici represented to this Court, that we had conferred with Root, Root's president, Mr. Hamilton, before the June 5 initial proceeding here, and had been instructed to tell this Court, by Root, that we were not to appear on their behalf, and to that extent we did appear on Root's behalf in the initial hearing.

That was the only thing that came up in the Supreme Court about this settlement. There was nothing there said or suggested that Root's settlement deprived the Court of any rightfully possessed judicial powers.

Mr. Harris has said that this Supreme Court opinion says that there were no parties in a case or controversy. I submit that what the Supreme Court has said is that the amici were not parties; that their clients were not parties. The Supreme Court did not say that there was not a case or controversy in which the fraud arose and did not say that the Court had no power to set aside that fraudulent judgment if it should determine the question of fraud. They said, "That question is not before us" and then proceeded to say that we amici having been paid by our private clients, were not entitled to be paid again so that we might reimburse those clients.

The Supreme Court also said that ordinarily—and I take a lot of consolation from that word—"Amici selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome."

I do not think this Court is at all interested in any words of mine that might be said on behalf of myself or my associates who appeared as amici in these proceedings. We never disguised our interest. We never concealed the fact that we represented private clients and were paid by them, and that is the normal situation.

It all stems back to that one basic proposition. Has the Court power to act in a matter of this kind, fraud upon the Court, that particular kind of fraud which constitutes bribing a judge—not subornation or perjury of a witness, not bringing a forged document before the Court, all of which might be obliterated if the parties settle—not that, but that peculiar type of fraud which means that, if committed, there was no judicial action, and therefore Mr. Harris' doctrine means that in the face of that acknowledged fact, that there was no judicial action, nevertheless the Court is powerless to expunge what appears to the world to be judicial action.

One word about the alleged informality of the proceedings before Master White. I challenge that statement. The record is before this Court. Counsel has again in argument referred to the only thing that he has ever been able to refer to, namely, the initial visit of Mr. White to the United States Attorney's office in New York to collect papers.

Now, I do want to scotch that one. I am reading at page 100 of volume 1 of the record.

> "The Master: Judge Denison being requested by the Master to indicate the procedure which he had in mind, suggested that the Master should procure the papers which the order indicates should be made available to him, and that they should be open to the inspection of all counsel as amici curiae before the next step is taken.
>
> "Have you gentlemen"—speaking to Universal —"anything to say about that?
>
> "Mr. O'Mara: Nothing excepting that it seems to me if they are made available for the inspection of amici curiae they should also be made available

for the inspection of counsel for the Universal Oil Products Company.

"Mr. von Holst: To which we agree.

"Mr. Thiess: No objection on our part."

The proceedings were conducted with the utmost fairness and formality. Mr. Harris says that these matters can be adjudicated in other plenary proceedings and that he welcomes it. That again is, if I may say so, beside the point, utterly beside the point, and I might mention this, that in the case pending in the Superior Court in Illinois, Universal has filed a motion to dismiss on the ground that the action is barred by the statute of limitations. That matter has not been heard. If it should be decided in Universal's favor, there will be no plenary hearing of the fraud there. In the antitrust case there has been a motion filed by Universal and the other defendants to strike from the record all the allegations, relating to this fraud. If the motion should succeed—it is now pending before the Court there—there will be no plenary hearing of Universal's fraud there. Universal had another case against it, filed by Eastern States, in the Superior Court of Illinois. That case has been settled and dismissed.

I submit that Universal's position has been consistent throughout. They don't want the fraud investigated. They don't want the consequences of the fraud visited upon them, and I submit that that position is diametrically opposed to the dignity and integrity of the courts and to the public weal.

Judge Biggs: Gentlemen, in respect to this second phase of the case, I think I should state for the record that I assigned myself to the case of the Universal Oil Products

versus Skelly in the District of Delaware, following Judge Nields' retirement and death. The matter which was argued before me—as I recall it, the argument took eight days—was the accounting, the correctness of an accounting rendered by Mr. William Prickett as Special Master. While that matter was under advisement this Court handed down its order, frequently referred to in 1944, whereupon counsel for Skelly filed a motion or a petition in which it set up the judgment, the order of this Court setting aside the prior judgments and recalling the mandates, as perhaps an effective block to the accounting proceeding.

Colonel Kingsland, as I recall it, and Mr. Potter suggested to me at a conference in my office, after that motion or petition had been filed, at which counsel for Universal were also present, that I was perhaps disqualified in that case, and I am not certain as to whether I was or was not. I might add that I had a good deal of tendency to disqualify myself in the case, but after Mr. Davis filed his motion here to intervene, it seemed to me perfectly obvious that I should not proceed in the Delaware proceeding, whereupon I revoked the order in that case, which, of course, meant that it would go to Judge Rodney, since Judge Leahy was disqualified.

I did not consider myself disqualified in this case here in this court, despite the intervention, because I had done nothing in the district court below which had looked toward a decision of the issue presented by the petition filed by Skelly there.

Will you proceed, Mr. Davis?

Mr. von Holst: May I file these memoranda with the Court?

Judge Biggs: Certainly.

I might add, I take it that counsel have no feeling that I should disqualify myself in this case.

(No response.)

Apparently not.

Do any of you feel that I should not proceed in this case by virtue of the fact that I sat in Delaware?

Mr. Harris: Certainly not.

Mr. von Holst: Not from our standpoint, Your Honor.

Judge Biggs: I take it that that is the view of everybody.

Very well, Mr. Davis.

Mr. Davis: If the Court please, I am here today pursuant to an order of the Court of November 16 of this year giving leave to the Skelly Oil Company to be heard as to its asserted right to intervene in these proceedings and in respect to any other matters which to the Court shall seem meet and proper. That order was entered by the Court on a petition which I signed and filed here on behalf of my client, the Skelly Oil Company, and in which petition dated in October, I think—it doesn't matter—in which petition, on behalf of the Skelly Oil Company, we asked permission to intervene and to participate in any further proceedings in this court or in the district court on the question whether there should be a dismissal for fraud, and on the preliminary question, at least, that is, the question of what should be done now, we made this request:

> "In any event, petitioner asks leave to intervene in this court for the preliminary question as to what further proceedings should be had in this case, leaving the question of intervention for other purposes to be decided later."

Now, I am in this position, if Your Honors please: I desire to put before the Court the fact and the manner in which the disposition here of this case, this Root case, will affect the right of my client and to ask that we be permitted to participate for the reasons which I am prepared to lay before the Court.

(Judge Biggs conferred briefly with his colleagues.)

Judge Biggs: We think, Mr. Davis, that you should be heard precisely as if you had been permitted to intervene. We will, however, reserve your right to intervention for further disposition.

Mr. Davis: Thank you, Your Honor.

The Skelly Oil Company has for many years been involved with the Universal in a patent infringement suit in which they were held to be infringers and in which an accounting was ordered, and as Judge Biggs recited a moment ago, the accounting proceeded before Mr. Prickett and he made his decision. In the course of that accounting use was made by Universal of the decision and opinion of this Court written by Judge Davis in the Root case. That decision, charged now to be a fraudulent decision, was brought into that case, into our case, and made use of before the Master.

It is our view, which we would be prepared to defend, that the opinion was actually written in a form that made it useful in the Skelly case. We think that the moral turpitude involved in the bribery of Judge Davis was accompanied, as is so often the case, by shrewd intelligence, and that it was part of a plan a part of which was to make use of that opinion in our cases.

The claim against the Skelly Company is something like six or seven million dollars. We are prepared to defend it,

and we will take the position, have taken the position before the District Court—we have a petition there to be permitted to file pleadings, and so forth, to be prepared to prove that this fraud was committed, and it will appear from the record that it was used in our case, and our position will be that the Universal should be thrown out of that case and the case dismissed on the ground of unclean hands.

Now, why do we want to get in this case? That is the question here. The answer to it is in our petition recited in some detail, but basically it is this, that the very same questions that exist here in this case, in precisely the same form, will arise in our case when we proceed again before the District Court. It is, therefore, two considerations which move us, at any rate, whether they will move the Court, to ask for intervention here. One of them is that an action taken in this court, any action taken that seems to say, "Oh, let's forget it. There is fraud in the Root case. Let's forget it" will be used, as Mr. Harris has already used it in other places, to say in the District Court, "Oh, the whole proceeding on fraud in the Court of Appeals was a nullity. It didn't lead anywhere and means nothing. The Court was convinced of that by the decision of the Supreme Court and wiped it out."

That is the argument that will be made. Well, now, we can make a contrary argument.

The other reason is that here is the place to try these questions of fact, to dispose of this question of fraud once and for all.

Now, if Your Honors please, I can't proceed to develop that theory without saying something about the interests of this Court in the situation, at least by indirection. It is perfectly plain to the Court that I am here represent-

ing a private interest, but I make that remark because as I go on from here I necessarily express thoughts about the interest of the Court here and of the judicial system, and I must break in, if I may, on that to say that this controversy here about amici carries me back half a century. My father learned his Latin at Bowdoin in New England; I learned mine in Knoxville, Tennessee. The result was that he said "Caesar (Seesar) dixit veni, vidi, vici", and I said "Caesar (Kisar) dixit weni, widi, wiki", and we never settled that controversy between us, so if I say "amici (amiki)——

Judge Biggs: I learned my Latin in the same school as yours, Mr. Davis, so perhaps I should say I am glad that I did. Apparently it is not that of the Supreme Court, at any rate.

Mr. Davis: No.

Well, it is, however, no laughing matter, this case. It happens that the first time I appeared in court was in this circuit. That is more than forty years ago, before District Judge Buffington, and here is the situation which, of course, strikes at the very heart of our institutions. There is nothing that strikes more directly at our system than the bribery of a federal judge.

Now, I say that because I think that this Court has ample power to dispose of the matter to the very ultimate limit of clarification and condemnation. I feel sure that the Court has the power to do that and should have the power for the good of the system, and I must say that although I have heard a great deal today about the Supreme Court decision pro and con, I have read it, and I can find in it nothing that points to a lack of power of this Court to rectify the situation.

It seems to me the decision means less than Mr. Harris said in some respects and more in others and possibly less than Mr. von Holst in implication, since I am neutral on that, but the situation, if Your Honors please, is this, it seems to me. There are three elements in it. There is a conviction in this court due to the proceedings that were had in this court in the report of Mr. White that Judge Davis was bribed and that the decision in the *Root* case was a fraudulent decision.

Now, the case has been to the Supreme Court, and that Court certainly affirmed the right of this Court to investigate the fraud and the right of this Court to proceed to apply sanctions, such sanctions as setting aside the judgment, as has been done in the *Atlas* case. The general power of the Court to investigate the fraud and to apply sanctions was certainly recognized and affirmed.

Then, I think, if I may be permitted to speak quite frankly about it, that this Court was admonished in this sentence, that if you are going to follow this investigation to a point of judicial judgment affecting the rights of Universal, then you should follow the safeguards that have been thrown around the judicial process in a controverted case.

We all know the views of Mr. Justice Frankfurter. They have been exposed not only in the decisions of the court, but in lectures and writings over and over again. I think we know why he used the word "fastidious".

Here is a justice who has said that the history of liberty has largely been the history of the observance of procedural safeguards. (*McNabb* v. *U. S.*, 318 U. S. 322, at 347.) I feel certain that that feeling was very clear in this opinion and the more clear because of the gravity of the offense charged.

Those things go together. If you need safeguards to preserve liberty, then you need to observe them fastidiously when you are charging a man with bribery of a federal judge, and I am frank to say to this Court that I share those opinions. This is not criticism of the Court at all. I am not going into that at all, but I share the view that fastidiousness, if you choose to use the word, is desirable in such proceedings leading to judgments and that in proceedings of this gravity fastidiousness is peculiarly desired, but now when it is said that this Court lacks power, and when that is spelled out in this decision of the Supreme Court, that is where I part company.

In the first place, let me say briefly what the Court decided, what was before it. The case had gone up there on certiorari for review of the decision of this Court allotting certain sums of money or ordering certain sums of money to be paid by Universal. There were two sums of money, one the fees to the attorneys, the amici, and the other the fees and costs of the instrument of this Court, the Master.

The Court had heard arguments and had listened to statements of fact about the parties, what the status was with respect to the controversy. Everything that was said here by Mr. Harris was said there and is reflected in the opinion. Mr. Justice Frankfurter, now that the Root case had been settled—I won't go into all those details—but in the opinion he recites those facts, that the case had been settled between the parties, and it was pressed upon the Court that because of that there was no case in which this Court could have acted at all. That was the argument, that there was no case and this Court had no authority, no business to be there or making any orders. That was the

argument, and it was pressed on the Court very earnestly, and there was talk back and forth between the judges and counsel, but in the end the Court, Justice Frankfurter, asserted the right of this Court to make the investigation and the right of this Court to impose sanctions, having made the investigation, but with this admonition that reduced to the simplest terms is, if you are going to deprive the Universal of the judgment in its favor, you better follow the established procedures fastidiously.

Judge Biggs: I don't quite follow you, Mr. Davis. Are you making a distinction between sanctions? When you say "sanctions", I assume you speak of the same type of sanction that Mr. Harris has suggested.

Mr. Davis: There are two kinds. I think that is right.

Judge Biggs: Let me put it this way. What do you mean by "sanction"?

Mr. Davis: Well, I mean specifically where a judgment is to be entered which deprives Universal of a property right, and I include in that the right to the old judgment.

Judge Biggs: Yes.

Mr. Davis: That Justice Frankfurter was saying, "I think such a judicial determination as that should be fastidiously based on the accepted procedure."

Judge Biggs: Does that mean that you would have to proceed with a plenary suit or does it mean that you would have to proceed entirely in an adversary way? In other words, how should we have proceeded? Let me put it that way.

Mr. Davis: Since you have brought in the "adversary way", Your Honor, may I say let us make a clear distinction between judicial power and procedure. Judicial power is one thing, and the safeguards of judicial procedure are

another. Whether you use the words "adversary proceeding" or say the ordinary lawsuit or the rules of court, or however you say it, power is one thing and procedure is another. Now, I say that the power of this Court to clear its escutcheon of that smear was never questioned in the Supreme Court. Indeed, I say it was affirmed, actually affirmed by the Court's decision. What I mean by that is this——

Judge Biggs: I am inclined to agree with you in that respect. I don't know whether my brethren are or not. Go ahead.

Mr. Davis: Well, I will just finish that sentence. After all, before Justice Frankfurter came to this remark, "The case may readily be disposed of on a narrower ground", they had disposed of the question of the order for the payment of money for the Master's expenses. In other words, they had been solicitous, if you please, to preserve the tools of the Court that might be necessary in carrying on an investigation of fraud, and if you contemplate what would have been the result of the opposite, if they had said the master can't be paid, the Court cannot use a master—of course, you can't get masters to work for nothing—the Court cannot use a master, it might have been a serious thing to say. They certainly didn't say that. They approved not only the expenditure for the master, but the putting of it on the losing party.

Now, there has been something said about the consent, and the Justice said something about that. He didn't use the word "consent", but Universal didn't consent that the order should be ordered against them for the money. They went ahead with the investigation. They recognized, as Mr. Harris pointed out—accepted the right of the Court

and the propriety of the Court's making the investigation. Although they opposed it at first, when the order came down they went along with it and they participated in it, and as Mr. Harris says, they recognized that, participating in it, they should take the chance of participating in the cost, but they didn't consent that the cost should be charged against them. In fact, that is why they were in the Supreme Court, because they hadn't consented to that.

Judge Biggs: Well, to come back to this question, how should we have proceeded?

Mr. Davis: I think, as you say, hindsight is better than foresight. I think you should have proceeded in this fashion: You should have taken the results of Mr. White's report which convinced you that a fraud had been committed and certainly was prima facie evidence of that, and then as we look back on it now, I think we can see that the Court should then have started a proceeding for dismissal of the case on the ground of unclean hands.

Now, let me pause there a minute parenthetically. That is the only real remedy an equity court has when fraud has been committed on it. The Court said, "You get out. This is an equity court, and we don't want you here, and if we have inadvertently by fraud been led to make a decree in your favor, we will set it aside. You are out of this court."

Well, I think that is how the proceeding should have been instituted. It should have been said to Universal, "Now, we have this evidence and we are going to proceed to dismiss this case for unclean hands," and you come in and say you are certain to the contrary, and since the court couldn't do it, all of the judges couldn't participate, then it should have been referred either to one judge or to a master to proceed in that manner.

Judge Biggs: Wouldn't Universal answer as follows, something along this line, Mr. Davis? Wouldn't they say, "There is no evidence indicating that we came into court with unclean hands. The evidence that you have is merely investigatory evidence. It is not any more than what has been achieved or arrived at by investigating. It enlightens the Court, but it is not received in an adversary proceeding."

How do you transform the status of that evidence by a rule to show cause? What magic is there in that?

Mr. Davis: Under the circumstances, you see, I would go the limit on that and I would say, "Let the proceeding be set up." To be sure, it is an order to show cause, which sort of puts the burden on the person ordered to show cause. We are not unfamiliar with that in patent cases. In the preliminary injunction proceedings we start with an order to show cause on affidavits, and so forth, but I would be solicitous not to have a shadow of depriving Universal of opportunity. I haven't thought this out in detail, but I can tell you what—

Judge Biggs: Let me interrupt just a moment. Let us assume the rule to show cause proposition. An answer would undoubtedly be filed, and you would have an issue of fact, wouldn't you?

Mr. Davis: Yes.

Judge Biggs: At that point someone must represent the Court or some other party, but let us assume, according to the view taken by the Supreme Court—I take it that that view, if I construe it correctly, is that it is not fastidious to have the Court represented by counsel for a party.

Mr. Davis: I wouldn't say that, Your Honor, would you?

Judge Biggs: That is what the Supreme Court decision means, as I construe it.

Mr. Davis: I think what they said was that it was not fastidious to have the people who are acting for the Court, who have already been paid by their clients who had an interest—it is not fastidious, he said, to return to those clients, to reimburse the clients, the money which they willingly paid.

Judge Biggs: Perhaps you are right about that. I am not certain about it. Let me put it this way: Is it your thought, do you construe the Supreme Court's opinion to take the position that if the Court employs amici, they may be amici who are also counsel or had been counsel for a party which is interested?

Mr. Davis: Oh, yes, I think there is no limitation. I don't think that question was involved at all. Let me read what they said.

> "Certainly it is not consonant with that regard for fastidiousness which should govern a court of equity, to award fees and costs of amici curiae who have already been compensated by private clients so that these be reimbursed for what they voluntarily paid."

However, I really don't know.

Judge Biggs: I am very anxious to get your view about this, Mr. Davis. I really want to get this straight if I can. Is it your view that the lack of fastidiousness arose when we required Universal to reimburse the parties who had employed counsel whom we had employed as amici? That is really what it comes down to, doesn't it?

Mr. Davis: Well, I think that is correct, Your Honor, on that one aspect of it, but surely we don't think that the

only thing that Mr. Justice Frankfurter thought of as not being fastidious was the matter of the payment of those fees.

Judge Biggs: That is what I am trying to get at. What else was lacking in fastidiousness?

Mr. Davis: I think that he thought there was lack of fastidiousness when the investigatory procedure—and it was started as an investigation; there is no doubt about that—was turned into a basis for judgment without due notice. I think Mr. Harris' statement of that was pretty accurate. I know and you know and everybody that has read the record knows that after the original investigation that was made by Mr. White in New York, he went around as somebody working for a District Attorney goes around, in getting together evidence for an indictment. In fact, he couldn't get at those papers without an order of the Court.

Judge Biggs: I think, Mr. Davis, there you are being unjust to the Master.

Mr. Davis: Well, maybe I am, but I want to say this, that they certainly couldn't be gotten at except the way he did get at them, by an order of court, because they were in the possession of the United States Government.

Well, maybe I am being unjust to him, but certainly from that moment on, when he started trying the case, he conducted it as a trial in every way that he knew how, with the utmost solicitude for the rights of Universal. We know that.

Judge Biggs: Then the original error, if there be an error, that Mr. White committed is the fact that he obtained certain papers in a permissive way rather than by subpoena, so to speak. In other words, he examined certain papers which were not made available to Universal.

Mr. Davis: Yes, sir, but I would rather not put it on him at all, Your Honor.

Judge Maris: The Court will have to take that responsibility.

Mr. Davis: I would say this, that there was enough in the story of the Fox case to arouse the suspicion of the Court. The Court certainly had not sufficient evidence before Mr. White was appointed. It does not seem to me they had to come out and say, "We now start a proceeding for setting aside the judgments for fraud."

Judge Biggs: I think that is perfectly true.

Mr. Davis: So they started Mr. White. It might have happened that at a critical moment Mr. White came to the Court and said, "I have evidence here which makes it pretty clear that there was a fraud, and I think now we ought to get in court and tell them."

Judge Biggs: Mr. Davis, I think it would be appropriate to take a brief recess. It is now 3:20. The Court will stand in recess until 3:30.

(A short recess was taken at 3:20 P. M. until 3:30 P. M.)

Judge Biggs: Mr. Davis, there are several other questions that I would like to ask you of your construction here of the Supreme Court decision. Is it your thought that the Court was at liberty—has the power; I will put it that way—that this Court has the power to compel its amici or its representative and its counsel to be paid, or do they have to proceed pro bono publico, that is, without compensation, as you consider the opinion?

Mr. Davis: You put it on the question with the word "power", Your Honor, and I started to talk about the

power of the Court, and then we got off onto procedure. Certainly Mr. Justice Frankfurter said, "While the amici formally served the Court, they were in fact in the pay of private clients. Amici selected by the Court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome."

Judge Biggs: Isn't that exactly what I said earlier and you disagreed with that, didn't you?

Mr. Davis: Well, if I did, I missed, really, the point of it, because here is the distinction. What the Court there said was, "The amici that this Court chooses ought not to be in the employ of some one of the private interests." That is quite a different thing.

Judge Biggs: I thought that was the question I posed.

Mr. Davis: Well, I am sure you did, but it got into my mind as though you were asking about the propriety of paying amici.

Judge Biggs: That is my second question. Isn't it inherent here that amici, that is, the representatives of the Court, must not be employed by a private interest and may not be paid?

Mr. Davis: I go along with the first part but not the second part. I think they might be paid if the Court has any funds to pay them with, but not paid by a private citizen.

Judge Biggs: That is the second point. Let us assume they might be paid, and let us discuss the practical aspect of this for a moment and see what you think of it. I think, after all, we understand your position here, too. Assume that we have proceeded by way of a rule to show cause and have appointed a master to determine the issues of fact which would have been arrived at by the rule and by the

answer to the rule and this mass of testimony or evidence or whatever you want to call it that Master White had collected. Obviously, of course, I doubt the feasibility or, in fact, the power of the Court to designate one of its members to be sort of a wandering master. I think the Court would have to act with three judges, but certainly we could appoint a master under Section 266. We would obviously have to have counsel. Now, how would we pay that master? How would we pay that counsel if we determined after due proceedings that Universal had not been guilty of fraud. What is your suggestion in that regard? How would we pay? We couldn't charge it against Root, because Root had never appeared. We couldn't charge it against Universal because Universal had committed no wrong. Therefore, our master and counsel representing the Court, if I may put it that way, or, at any rate, counsel acting on behalf of the Court, how could they be paid?

Mr. Davis: The question of counsel, it seems to me, is taken care of by the suggestion of the Solicitor General, who evidently has the feeling that his office is available as counsel to the Court.

Judge Biggs: It is, to the Supreme Court, but it isn't available to us, Mr. Davis.

Mr. Davis: It isn't?

Judge Biggs: Is it your thought that we should proceed through the Attorney General?

Mr. Davis: Through the Solicitor General. I would think so.

Judge Biggs: The Solicitor General's office is only that of acting as counsel, as you know, sir, in proceedings before the Supreme Court. We can't call on the Solicitor General.

Mr. Davis: I don't know whether you can act through the Attorney General's office. Now, the problem you pose,

Your Honor, is this, and it is a real one, that assuming that the Supreme Court has said that it is not fastidious to have the amici paid by private clients——

Judge Biggs: Or amici who represent private clients.

Mr. Davis: Your problem is to get these people paid. Now, you have no difficulty, Your Honor, in getting counsel from the bar for the Court.

Judge Biggs: Do you think so, Mr. Davis? Do you think that you could call on counsel? I merely ask you this as a practical suggestion. You might bear in mind, I think Mr. Thiess and Mr. von Holst spent a year and a half of their time. Do you think that the Court would call on counsel from the bar—we will say two leading lawyers and quite a few assistants—to be compelled to spend something like 3800 hours?

Mr. Davis: I don't like the word "compelled", Your Honor, but I haven't the slightest doubt that if this Court called on the bar to supply counsel without charge, they would get eminent counsel. I haven't a doubt about that. Now, it is a little different about a master, because I see this difficuty about the master. If the master says, "All right, I will serve, and I am going to get paid if Universal loses, and I want to volunteer if they win"——

Judge Biggs: He would be exactly in the position of a Delaware Justice of the Peace.

Mr. Davis: Yes, I think you ought to make some provision for compensating the master. Now, whether the Court has any funds, I don't know. You have asked me a question, Your Honor. I don't know the answer.

Judge Biggs: I don't, either, but I am merely wondering if you don't come to a point where perhaps the word "fastidiousness" loses some of its magic, in view of the

practical side of the picture with which the Court is sometimes confronted?

Mr. Davis: It often happens, Your Honor. It is easier to be fastidious in the parlor than it is in the kitchen. There is no question about that.

Judge Biggs: That is quite true, and the closer you get to the parlor, the more fastidious you become, I notice.

Mr. Davis: Well, I notice that too.

Judge Biggs: But to come back, now. You would proceed here, to take the practical present situation, you would say that this Court would have the power to now proceed by a rule to show cause, wouldn't you?

Mr. Davis: Yes. Let me say a word about power, Your Honor. It is a long story. We have looked into it very carefully, and it has been mixed up in this case from the beginning with the question of procedure, and I say to you that when a litigant comes into this court and submits himself to the jurisdiction of this court and brings in his adversary, they are in this court forever, if necessary, to the vindication of the authority and integrity of the court.

Judge Biggs: With that I agree.

Mr. Davis: And if you think you have to have an adversary to punish a man or to take away his judgment of which he has defrauded the court, well, Mr. von Holst spoke rather movingly about it and so would I.

Judge Biggs: Well, now, to come back to your own situation. You desire to intervene here. You desire to intervene in order that the judgment may be set aside. Would you take the position here that what we should do is vacate our former order setting aside the judgment and then proceed under a rule to show cause on the testimony or evidence or whatever it is that Mr. White has accumulated?

Mr. Davis: We have given some thought to that, Your Honor, and the suggestion I would make is, by an appropriate order of this Court, the judgment, the old judgment, should be suspended, really, in a sense that it is where it is now, because certainly Mr. Harris has told us that he regarded that order as not a final order and he thinks the Supreme Court did, but whether they did or not does not matter. It seems to me that judgment should be put in suspension pending the outcome of these proceedings to show cause.

Judge Biggs: I am not sure, sir, how you put a judgment in suspension. I think you can have a judgment or you can have no judgment, but I never heard of a judgment being suspended.

Mr. Davis: I have thought something about that. There are greater experts than I, including yourself, on the subject.

Judge Biggs: I am not an expert.

Mr. Davis: But whether you simply say that execution of the judgment is deferred, or what you do, I think the thing should be left in abeyance and that the judgment should be set aside for fraud, and if the Court is not prepared to do it on the evidence before it, then I think, to clear the thing up once and for all, it should proceed with an order to show cause and either let Mr. Harris restore the purity of the escutcheon of his client or restore the purity of the escutcheon of this Court. Those are the two choices.

Judge Biggs: Assuming the judgment was set aside after an adversary proceeding with amici acting with due fastidiousness, then you would take the view that the judgment of this Court, expressed in Judge Davis' opinion,

which you believe was wilfully written in order to affect the Delaware situation, you think that would in effect do what? Affect the standard of comparison in the Delaware proceeding?

Mr. Davis: That is one of the principal things. You see, the Winkler-Koch process, you are familiar with the details?

Judge Biggs: I have forgotten most of them.

Mr. Davis: Well, the Winkler-Koch process was for all practical purposes the same as the Holmes-Manley process, and in our case we set up the Holmes-Manley process as standard comparison.

Judge Biggs: Whereas this other would have been available? You had to figure royalties on Holmes-Manley, whereas you wouldn't——

Mr. Davis: Not quite. We set up Holmes-Manley as a standard of comparison, and they said, "Oh, but that is the same as Winkler-Koch and it is covered by this decision of Judge Davis, so you can't use it as a standard of comparison," so we went to the less favorable one.

That is the only part of it, Your Honor.

Judge Biggs: You say it was written to affect the Delaware situation. You meant the proceeding before the Master, did you not?

Mr. Davis: Yes, of course, but, Your Honor, there were things said in the Delaware court——

Judge Biggs: You mean before Judge Nields?

Mr. Davis: —in the trial of the Skelly case which were quite contradictory to the things said about the same invention to the Delaware court and to this court in the Root case.

Judge Biggs: Then, in effect, your application does have certain aspects of something like a petition for leave to file a bill of review, doesn't it?

Mr. Davis: Yes.

Judge Biggs: To go back into Delaware so you can prove the invalidity of a judgment obtained twelve years ago, isn't it?

Mr. Davis: Yes. Not to prove the invalidity of it, no. Our position is very simple, Your Honor. We say that these people brought before the Master—the Master now is acting, mind you, as an agent of this Court to take an accounting.

Judge Biggs: Agent of the District Court.

Mr. Davis: Agent of the District Court, but on the mandate of this Court. It was still an equity case, and there were large sums of money involved, and they came in with this fraudulent opinion and decree, and as I said to you before, Your Honors, on an earlier occasion, I am not disposed to argue what effect that had on the Master's mind, what ramifications it might have had in the final conclusion of the Master, whether it did or did not exclude the Holmes-Manley basis of comparison. I say when the man comes into court with a fraudulent decree, knowingly, an equity court throws him out, and you don't ask any questions, and if ever there was a case, it is this. How can he push to the ultimate limit the wiping out of this affair? How better than to say that those people, if we find they were guilty, and we have given them every chance to prove they were innocent, and been fastidious about that, then shouldn't the Court say that everywhere and anywhere where they used that piece of fraud they are thrown out of court?

I want to wind up by saying once again why I think we ought to come in, but still on the other subject it would seem to me a sorrowful thing to have cases going on in this circuit and in the state courts of Illinois, in which the question whether the Circuit Court of Appeals of the Third Circuit had been corrupted was a matter of litigation, and it appeared that the matter had been in this court and had not been disposed of forever.

That to me would be a very sorrowful thing, but to go one step further, as Mr. Harris proposes to do, and say that the Court of Appeals of the Third Circuit is impotent to go to the limit because the parties, one of them a crook by assumption, agreed that the Court shouldn't go any further, seems to me horrible, and there certainly is nothing in the Supreme Court's decision or in any decision I ever saw to justify that, and I think it is quite simple what the Supreme Court really said. They said of course the Court has power to investigate this thing and investigate it effectively. I don't think he was splitting hairs about "effectively". He meant to carry it through. That is inherent in the court. These parties came here and submitted them to the court, and if they smeared the court after that, I think the court has the power to catch it forever, as they did indeed in the Atlas case.

Now, the distinction in the Atlas case was put on this, Your Honor, that there although the money had been paid, the whole thing was over, one of the parties came in to complain. That was the main distinction. There was still an adversary.

Well, we have a case here, the American Wood Paper Company against Neff, in 131 U. S. That was a patent case, too, I regret to say. Chief Justice Chase wrote the

opinion. The facts there were that the case had gone along to final determination, that is, by the district court, and was on appeal, and the parties were going along all right. The appellee had not appeared in court. A stranger came in and said that these fellows are in cahoots here. They have come to an agreement. They want the decision of the court to stand. They want to use it for their private purposes, and they are going ahead on that basis.

They submitted affidavits. The court thereupon started an investigation in the thing, referred it to a master, and concluded that there was that conspiracy to defraud the court, and dismissed it.

Now, I mention that because it was not initiated by one of the original parties, but maybe Mr. Harris will say, "Oh, it was still an adversary case," but I say to you that the judicial power of this court, having once gotten this case, never ceases, and you don't have to have an adversary in the sense of somebody that can say, "Me, too" to what the court is saying. The court is saying, "You bribed Judge Davis," and that you have to have an adversary to come here and say, "I think you bribed Judge Davis, too," is certainly unsound. The court can proceed—the court proceeds in thousands of cases without an adversary in that sense.

A fellow comes in for naturalization——

Judge Biggs: I think we grasp that point.

Mr. Davis: Yes. Well, I just want to add this, why I am here. Not as amici, because goodness knows——

Judge Biggs: It would not be fastidious for you to be here as amici.

Mr. Davis: No, I don't think so, but I am in the kitchen, not in the parlor, in this case. They are trying

to get $7,000,000 out of my client. I don't think they ought to do it, and I have no sympathy at all, frankly, with what Mr. Harris said about the crooks having moved out of the picture and having substituted an eleemosynary institution. I am not interested in preserving the purity of the escutcheon of that eleemosynary institution. I am interested in $7,000,000. I have no sympathy with Mr. Harris' suggestion that he would like to try this question in a more salubrious climate, and I am quite frank to say that I prefer to have him try it in this climate. He is representing his client and I am representing mine on that, but I say this is where the offense was committed and I think this is where it should be disposed of.

Judge Biggs: One further question, Mr. Davis. I am not quite clear as to one point. The decision of this Court, the original decision of this Court, in the Universal-Root case is arrived at after Judge Nields' decision on the validity and infringement of the patents involved in the Universal Oil case versus Skelly. That is the pending Delaware case, and it is your position or your contention that the opinion of Judge Davis in the Universal Oil case was written to affect the Master accounting and went no further than that?

Mr. Davis: Well, it had other purposes, but that was—what I say about that is a little subtle, Your Honor. I could explain it more in detail, but what I mean is this, or let me preface that by saying this: We are asking to come here to intervene in this case because we think that the question of fraud ought to be disposed of in this court in the Root case, and we would like to participate because the same questions are going to be involved in our case.

Judge Biggs: But only as to the accounting.

Mr. Davis: Yes, but if we get in and the Court disposes of this in the Root case by whatever proceeding, by an order dismissing for unclean hands, we go down to Delaware then and we say that this decree that they brought in before the Master was a fraud. We don't have any argument about that. That is all that we get out of it. We don't have Mr. Harris say, "Oh, it wasn't a fraud. They started proceedings up there, and they weren't conducted fastidiously, and they came to no conclusion, and the Court was convinced of that and threw them out." We go down to Delaware with the fact that this was a fraud established.

Now, we then assume the burden, Your Honor, in Delaware, not here, of showing that that fraudulent decree was used in our case to our detriment in such a way as to justify the dismissal of that case, and, of course, I am not urging here today that this court now give any thought to that question at all in any aspects of it. We win or lose in the district court on that aspect of it.

Judge Biggs: That is the point that I want to get clear. That will in effect set aside the entire judgment of the Court, the earlier judgment, will it not?

Judge Maris: It would call for a dismissal of the complaint.

Judge Biggs: On the ground of unclean hands; is that correct? I am sure that is.

Mr. Davis: Well, maybe it would. The only question that arises in my mind—I haven't thought it out—is that the unclean hands down there—the hands were clean until after the patent had been sustained. They got their hands dirty on the accounting.

Judge Biggs: Well, that might make a difference. Do you have a brief on it?

Mr. Davis: I should like to submit a brief particularly on this question of power as distinguished from procedure.

Judge Biggs: I think we should have it.

Mr. Davis: All right, thank you very much.

Judge Biggs: Mr. Harris.

Mr. Harris: I won't take but just a moment.

Judge Biggs: We desire you to take as much time as you want. We think this is a very important question.

Mr. Harris: It is a very important question to the Court and to all the persons who are here and the interests they represent, of course, and I don't want to allow either Mr. Davis, with his wonderful facility for language and improvisation, or Mr. von Holst to put me in the position of trying to take away from this Court any of its perquisites—that would be pretty selfish, I think—or try to persuade you that you lack the power to punish wrong perpetrated upon the Court.

Mr. Davis says that he can't imagine, citing no authority, but he just can't imagine that if an offense is as heinous as he depicts it, which, of course, hasn't been proved yet—the Supreme Court says it hasn't—that this Court can be without authority to do something about it.

Well, that is hardly a lawyer's argument. I really am afraid that Mr. Davis' distinguished association with bureaucracy in Washington has been so elaborate that, in keeping with most of his fellow bureaucrats, he doesn't think there is any limit to any power that anyone feels he should assert.

Unfortunately for him and fortunately, I believe, for the rest of the country, the Constitution still places certain limitations on action, and it does place a very specific

limitation upon the exercise of judicial power by the courts of the United States, and that limitation is that there must be a case or controversy.

Now, perhaps Mr. Davis would not agree that the decisions of the Supreme Court construing what constitutes a case or controversy should have been decided as they were. Unfortunately, they have been decided that way from the earliest cases—one of the early ones is the Muskrat case—right down to the last term of court, and to the effect that in order to have a case or controversy there must be adversary parties before the court involved in the litigation of a controversy between them which is otherwise cognizable by the court.

I don't think Mr. Justice Frankfurter anywhere spoke of fastidiousness or lack of fastidiousness in this case with respect to this question of power. The lack of fastidiousness, if there was one, and this was not a point which we argued—it was not in any brief, and it sprang full blown from the brow of the Supreme Court—the lack of fastidiousness to the extent that there was one was their feeling that those who were representing private litigants in a delicate case of this sort ought not to act. I am just as glad to be instructed as anyone else is in that procedure, because I should never have thought of changing that procedure. But the real nugget here for us to consider still is and always will be the paragraph on page 5, part of which I read in my argument this afternoon, and which, then being diverted, I did not complete.

Bearing in mind the findings of fact of the Court, we now proceed—because my way of arguing a case is to try to cite chapter and verse—proceed to read that paragraph as a whole and then I shall sit down.

> "The inherent power of a federal court to investigate"—and this is in the light of all of the facts found by the Court—"whether a judgment was obtained by fraud, is beyond question." Citing Hazel-Atlas. "The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation."

Who may be affected by the outcome of an investigation? If it is an adversary proceeding, obviously those who have judgments and things of that sort may be affected. If there is no adversary proceeding, then I think it is a matter for discipline or contempt or possibly criminal prosecution or what not.

The fact that it may bring before it by appropriate means all those who may be affected by the outcome of its investigation is then qualified by this:

> "But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed."

Now, an adversary proceeding is a proceeding in which there is an adversary. It is a case or controversy under the Constitution.

> "No doubt, if the court finds after a proper hearing"—and this is as far from being iffy as anything can be, in view of the judgment of the Court—"that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties."

Meaning again that there are adversary parties before the Court. It all hangs right together.

> "Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs. Sprague v. Ticonic National Bank . . ."

Again a qualification. Every time the learned Justice makes one of these statements that seem to help the amici, he qualifies it.

"But, obviously, a court cannot deprive a successful party"—meaning even if he is guilty of fraud, and, mind you, Your Honors, we don't concede we are guilty of fraud. It is just assumed that I am representing a convict here who is asking for mercy. I don't think in the juridical sense of the word we have had a fair trial, and we deny that vigorously.

Judge Biggs: We understand that.

Mr. Harris: "But, obviously, a court cannot deprive a successful party of his judgment without a proper hearing. This question is not before us, except as it bears on the order allowing attorneys' fees and costs."

Now, mind you, this is all in the light of the finding that there were no parties before the Court.

> "But if the judgment could not be nullified without adequate opportunity to be heard in a proper contest,"—a contest necessarily consists of two or more adversaries—"neither is it just to assess the fees of attorneys and their expenses in conducting an investigation"--not a contest, an investigation—"where petitioner throughout objected to the character of the investigation if it was to be used as a basis for adjudicating rights."

Now, that is the broad ground upon which the Supreme Court declined to affirm the order for costs.

May I, instead of answering Mr. Davis on the motion for leave to intervene, submit some briefs?

Judge Biggs: Yes. Did you cover any other questions in your brief?

Mr. Harris: I have not as yet.

Judge Biggs: Would you like to file briefs?

Mr. Harris: We should like to very much.

Judge Biggs: And you have filed a brief, Mr. von Holst?

Mr. von Holst: We have.

Judge Biggs: I suggest that you make such answers to each other's briefs as you deem necessary. Mr. Davis will do the same thing, and we will not put any restriction in time on you. We will ask that counsel reply and file their briefs and replies as promptly as they can.

Mr. Harris: Your Honor, in order that we may have a little system about it, Mr. von Holst has filed his brief. Mr. Davis is supporting Mr. von Holst.

Mr. von Holst: We are arguing independently in this matter.

Mr. Harris: I understand that, but I mean supporting your position.

Judge Biggs: I think he is entitled to file his own brief.

Mr. Harris: I understand, but may I not wait till I get both briefs, so that I can answer in one brief?

Judge Biggs: Certainly you can.

Mr. Davis: Do you mean, Mr. Harris, that you don't want us to have copies of this brief?

Mr. Harris: Not at all.

Mr. Davis: Of course, we will arrange with Mr. Harris——

Judge Biggs: I am sure you will.

Mr. Davis: Can it be understood, then, it is left to counsel to exchange briefs with one another and that everybody may have an opportunity to answer in the usual procedure the other fellow's points?

Mr. Harris: Yes, but you have filed your petition and I will answer it and then you can reply to it. Have you filed a brief in support of your motion for leave to intervene?

Mr. Davis: No.

Mr. Harris: Are you going to file it?

Mr. Davis: Yes. Our brief will cover that too. You have seen our petition.

Mr. Harris: Yes, we have.

Judge Biggs: Well, I take it that the gentlemen will supply each other with all necessary papers and make their replies in due course. I think it unnecessary to put limits of time on counsel in this case. Don't you agree?

Judge Maris: Yes.

Judge Biggs: Very well, counsel, this will conclude the hearing. We will stand adjourned until ten-thirty tomorrow morning.

Mr. Harris: Will eight copies be sufficient for the Court?

Judge Biggs: Yes, just give them to the Clerk.

(Adjourned at 4:15 P.M.)

Agreement of Settlement

AGREEMENT, dated as of the first day of April, 1939, between UNIVERSAL OIL PRODUCTS COMPANY, a Delaware corporation, hereinafter referred to as UNIVERSAL OF DELAWARE, UNIVERSAL OIL PRODUCTS COMPANY, a South Dakota corporation, hereinafter referred to as UNIVERSAL OF SOUTH DAKOTA, and ROOT PETROLEUM COMPANY, a Delaware corporation, hereinafter referred to as ROOT.

In consideration of the execution and delivery of a license agreement between UNIVERSAL OF DELAWARE and ROOT, dated as of April 1, 1939, and of the premises and for other good and valuable considerations, receipt whereof by each of the parties is hereby acknowledged, the parties agree as follows:

1. UNIVERSAL OF SOUTH DAKOTA and UNIVERSAL OF DELAWARE hereby released ROOT from all claims for past infringement of their respective pyrolytic cracking patent rights for ROOT's pyrolytic cracking operations at Eldorado, Arkansas.

2. UNIVERSAL OF SOUTH DAKOTA and UNIVERSAL OF DELAWARE shall promptly cause to be dismissed the suits presently pending in the United States District Court for the District of Delaware, entitled Universal Oil Products Company vs. Winkler-Koch Engineering Company and Root Petroleum Company (formerly Root Refining Company) in equity Nos. 716 and 895, and ROOT shall promptly cause to be dismissed its Bill in the Nature of a Bill of Review and for Rehearing, as Amended, and its Petition to apply to the District Court for the District of Delaware for

leave to file such Bill in such suits, each party to bear its own costs therein. It is agreed between the parties that a final decree of dismissal shall be entered in the above entitled suits substantially in the form of the final decree attached hereto and made a part hereof.

3. It is represented by UNIVERSAL OF DELAWARE that it has an agreement with The Texas Company, dated as of July 29, 1937, a copy of the pertinent provisions of which said agreement is attached hereto and made a part of this agreement, showing the extent of, and restrictions on, the rights of UNIVERSAL OF DELAWARE in said agreement of July 29, 1937, and UNIVERSAL OF DELAWARE will, to the full extent of its authority under said agreement, grant to ROOT the immunities, releases and rights possessed by UNIVERSAL OF DELAWARE in accordance with the terms and conditions of said agreement, dated as of July 29, 1937.

4. ROOT hereby sells, assigns, transfers and sets over to UNIVERSAL its entire right, title and interest in and to the Letters Patent and the pending applications for Letters Patent listed in the schedule attached hereto and made a part of this agreement, together with the right to recover for all past infringement of said Letters Patent, but ROOT reserves to itself for its own use unlimited rights under such Letters Patent and such application for Letters Patent without accounting to UNIVERSAL therefor.

5. Each of the parties covenants that when requested by the other, it will execute and deliver or cause to be executed and delivered, such further documents as may be necessary to carry into effect the provisions of this agreement.

IN WITNESS WHEREOF, the parties hereto have caused their respective corporate names to be hereto subscribed and their respective corporate seals to be hereunto affixed and attested by their respective officers and agents thereunto duly authorized.

In triplicate.

UNIVERSAL OIL PRODUCTS COMPANY
(South Dakota)

By H. J. HALLE President

Attest: W. M. BEHRENS
Secretary

UNIVERSAL OIL PRODUCTS COMPANY
(Delaware)

By H. J. HALLE President

Attest: W. M. BEHRENS
Secretary

ROOT PETROLEUM COMPANY

By D. P. HAMILTON President

Attest: T. E. BAIRD
Secretary

Letter Modifying Paragraph 2 of Agreement of Settlement

January 25, 1939

Universal Oil Products Company (Delaware)
Universal Oil Products Company (South Dakota)
50 West 50th Street,
New York, New York.

Dear Sirs:

In connection with the Agreement of Settlement dated as of the first day of April, 1939, being negotiated between your Companies and Root Petroleum Company, a Delaware corporation, we hereby agree that paragraph 2 of such Agreement of Settlement shall be modified to read as follows:

2. Root shall promptly cause to be dismissed its Bill in the Nature of a Bill of Review and for Rehearing, as Amended, and its Petition to apply to the District Court for the District of Delaware for leave to file such Bill in the suits presently pending in the United States District Court for the District of Delaware, entitled Universal Oil Products Company vs. Winkler-Koch Engineering Company and Root Petroleum Company (formerly Root Refining Company) in equity Nos. 716 and 895, and upon written request of Root, Universal of Delaware shall promptly take any and all steps and do any and all acts necessary or appropriate to enable Root to obtain an Order cancelling the Supersedeas Bond posted in such suits and releasing the moneys and the mortgage deposited in escrow by Root as security for such Bond. Neither Root nor Universal of Delaware shall take any further action or proceeding in such suits

of any kind or nature whatsoever without first obtaining the written consent thereto of the other, and all proceedings, other than those referred to in the first sentence of this paragraph, heretofore had in such suits or either of them shall remain unaffected by this Agreement.

Yours very truly,

ROOT PETROLEUM COMPANY

BY D. P. HAMILTON
Pres.

ATTEST:

T. E. BAIRD
Secretary

We hereby consent to the above modification of the said Agreement of Settlement.

UNIVERSAL OIL PRODUCTS COMPANY
(Delaware)

BY H. J. HALLE
President

ATTEST:

W. M. BEHRENS
Secretary

UNIVERSAL OIL PRODUCTS COMPANY
(South Dakota)

BY H. J. HALLE
President

ATTEST:

W. M. BEHRENS
Secretary

Agreement between The Texas Company and Universal

AGREEMENT, dated as of July 29, 1937, between THE TEXAS COMPANY, a Delaware corporation, acting on behalf of itself, its parent, The Texas Corporation, a Delaware corporation, and the subsidiaries of The Texas Corporation, hereinafter collectively referred to as TEXAS, and UNIVERSAL OIL PRODUCTS COMPANY, a Delaware corporation, acting on behalf of itself and its subsidiaries, hereinafter collectively referred to as UNIVERSAL.

For and in consideration of One Dollar ($1.00) and other good and valuable considerations, receipt whereof is hereby acknowledged, TEXAS hereby grants, releases and covenants as follows to and with UNIVERSAL:

1. Whenever used herein, the following terms shall have the following meanings respectively:

The term "patents" shall mean all patents of the United States and all foreign countries (except Japan) and transferable rights thereunder, now or hereafter owned or controlled (in the sense of having the right to grant licenses or immunities thereunder) by the corporation designated and based upon inventions made prior to July 1, 1947.

The term "cracking patent rights" shall mean all patents covering:

(a) Any pyrolytic cracking process, excluding:

(1) hydrogenation processes,

(2) gas pyrolysis and gas polymerization processes, and

(3) catalytic processes;

(b) Any apparatus for carrying out any such pyrolytic cracking process; or

(c) Any products produced directly by any such pyrolytic cracking process.

The term "hydrogenation processes" shall mean processes involving or not involving pyrolysis but in which the oil is subjected to the action of hydrogen in the presence or absence of a catalyst, to a degree or extent or in a manner to secure definitely determinable hydrogenation.

The term "gas pyrolysis and gas polymerization processes" shall mean processes in which gas, as distinguished from vaporized oil, is treated for the production of liquid products.

The term "catalytic processes" shall mean processes in which the cracking, measured in terms of the principal product of the process, is predominantly catalytic.

The term "subsidiaries" shall mean all corporations of which the parent company now owns, or shall acquire, directly or indirectly, more than fifty per cent. (50%) of the stock having the right to vote for directors.

For the purpose of the above definition, the stock owned by the parent company shall be deemed to include all stock having the right to vote for directors and owned directly or indirectly by any of its subsidiaries as defined above.

The term "cracking patent rights of TEXAS" shall mean and shall be deemed to include the cracking patent rights of TEXAS, Indiana, Jersey, Atlantic, Gulf and Gasoline.

The term "Gasoline" shall mean Gasoline Products Co., Inc., a Delaware corporation, and its subsidiaries.

The term "Indiana" shall mean Standard Oil Co. (Indiana), an Indiana corporation, and its subsidiaries.

The term "Jersey" shall mean Standard Oil Company, a New Jersey corporation, and/or Standard Oil Development Company, a Delaware corporation, and their respective subsidiaries.

The term "Atlantic" shall mean The Atlantic Refining Company, a Pennsylvania corporation, and its subsidiaries.

The term "Gulf" shall mean Gulf Oil Corporation, a Pennsylvania corporation, and its subsidiaries.

The term "Japan" shall mean all territory to which patents of the Empire of Japan extended on July 29, 1937.

2. TEXAS grants to UNIVERSAL a release from all claims for past infringement and an irrevocable, unlimited, non-exclusive, non-transferable, fully paid license, under the cracking patent rights of TEXAS for the full term of the patents and TEXAS empowers UNIVERSAL to grant releases and sublicenses without accounting to TEXAS under such cracking patent rights for the full term of the patents to any or all of the present licensees of UNIVERSAL, and to any or all of the future licensees of UNIVERSAL, except to any corporation, firm or partnership licensed under any or all of the cracking patent rights of TEXAS in any country prior to July 29, 1937, upon the following conditions:

(I) Should any licensee of UNIVERSAL to which UNIVERSAL shall have granted any release, license or immunity pursuant to the provisions of this agreement bring suit for infringement of such licensee's cracking patent rights against TEXAS, Indiana, Jersey or Gasoline, or against any licensee of any of them, as the result of acts performed by such licensee with the approval of

TEXAS, Indiana, Jersey or Gasoline as a part of a unitary pyrolytic cracking operation licensed under any or all of the cracking patent rights of TEXAS, the bringing of such suit shall ipso facto be deemed as to such licensee of UNIVERSAL to have terminated ab initio such release, license or immunity to said licensee of UNIVERSAL under the cracking patent rights of the defendant in such suit; and

(II) The rights hereby granted to UNIVERSAL under the patents covering the inventions of John C. Black are subject to the express conditions that if UNIVERSAL has at the date of this agreement, or shall at any time hereafter become entitled to rights of any character in respect of such patents through, under, or by reason of any license or other rights previously granted in respect of such patents by said John C. Black to Standard Oil Company (California), Pan American Petroleum & Transport Company and/or Pan American Petroleum Company, than and in such event all rights granted or purported to be granted to UNIVERSAL by this agreement in respect of such patents shall forthwith and ipso facto terminate, but only to the extent that such rights shall be effective, and that if any licensee of UNIVERSAL has at the date of this agreement, or shall at any time hereafter become entitled to any such rights, then and in such event all such rights granted by this agreement in respect of such patents to such licensee shall forthwith and ipso facto terminate, but only to the extent that such rights shall be effective.

AGREEMENT

between

ROOT PETROLEUM COMPANY
(Formerly Root Refining Company)

and

UNIVERSAL OIL PRODUCTS COMPANY

Dated: July 28, 1944.

AGREEMENT dated July 28, 1944 between ROOT PETROLEUM COMPANY (formerly Root Refining Company), a Delaware corporation (hereinafter called "Root"), and UNIVERSAL OIL PRODUCTS COMPANY, a Delaware corporation (hereinafter called "Universal"),

WITNESSETH:

1. Root and Universal entered into a License Agreement dated April 1, 1939 for pyrolytic cracking of hydrocarbons by Root under Universal's patents, which Agreement expired on March 31, 1944.

2. By Settlement Agreement dated April 1, 1939, as modified by agreement as of April 1, 1939, signed by Universal Oil Products Company, a South Dakota corporation, as well as by Universal, Universal released the bond of Root filed with the District Court of the United States for the District of Delaware in the suits of *Universal Oil Products Company* vs. *Winkler-Koch Engineering Company and Root Refining Company,* Nos. 716 and 895 in Equity, in which suits judgment for the plaintiff for infringement of certain of its patents was rendered by said District Court and affirmed by the Circuit Court of Appeals for the Third Circuit. Since such affirmance said Circuit Court of Appeals for the Third Circuit in a proceeding entitled *Root Refining Company* vs. *Universal Oil Products Company,* Nos. 5546 and 5648, set aside its judgment of affirmance and directed a reargument of such appeal.

3. Neither of the parties hereto desires to continue such litigation and, regardless of their respective claims of infringement and non-infringement, have agreed to settle the differences between them as follows:

(a) There has been paid by Root to Universal on account of said Settlement Agreement the sum of $32,298.38 and on account of said License Agreement the sum of $69,819.06. Universal agrees to repay to Root forthwith the said sum of $32,298.38 and Root agrees that Universal may retain the said sum of $69,819.06, and it is agreed that said Settlement Agreement is herewith terminated.

(b) In consideration of the foregoing: Root releases Universal from any and all claims of every nature and kind whatsoever, either in law or in equity, from the beginning of the world to the date of these presents.

Universal releases Root from any and all claims and demands whatsoever, either in law or in equity, arising out of any infringement or alleged infringement of Universal's patents for the pyrolytic cracking of hydrocarbons or arising out of the infringement or alleged infringement of patents of others involving pyrolytic cracking, to the extent that Universal may legally do so (including specifically, but without in any way limiting the generality of this release, the said judgment obtained by Universal against Root in said District Court of the United States for the District of Delaware), from the beginning of the world to the date of these presents.

Universal also releases Root from any and all claims and demands whatsoever, either in law or in equity, arising from the above described agreements entered into by the parties hereto as of April 1, 1939, as amended, from the beginning of the world to the date of these presents.

Universal also grants immunities to Root for pyrolytic cracking of hydrocarbons by Root in its existing cracking plant, or in any pyrolytic cracking plant of the same type of operation replacing the same, under Universal's presently

existing patents, as well as the presently existing patents of others, to the extent that Universal may legally do so.

The parties hereto agree (a) that the decree of the District Court of the United States for the District of Delaware, entered in the suit entitled *Universal Oil Products Company* vs. *Winkler-Koch Engineering Company and Root Refining Company*, Nos. 716 and 895, shall be vacated, (b) that the bills of complaint filed in said suit shall be dismissed, and (c) that either party may cause an order or orders to be entered, or do whatever otherwise may be necessary or advisable to effect the foregoing without further notice to the other.

This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. This agreement may be executed in one or more counterparts which, together, shall constitute this agreement.

IN WITNESS WHEREOF, the undersigned have caused this agreement to be executed by their proper officers thereunto duly authorized.

ROOT PETROLEUM COMPANY

By D. P. HAMILTON
President

Attest:
T. E. BAIRD
Secretary

UNIVERSAL OIL PRODUCTS COMPANY

By J. G. ALTHER
Vice President.

Attest:
W. M. BEHRENS
Secretary

Order dated June 20, 1947

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5546 October Term 1934

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

ORDER

Present: BIGGS, MARIS, GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

AND NOW, to wit, this 20th day of June, 1947, it is

ORDERED that the intervention of Skelly Oil Company, as prayed for by it, be and the same hereby is authorized and allowed; and it is

FURTHER ORDERED that the order of this court of June 15, 1944, setting aside and vacating the judgment of this court entered on June 26, 1935 be and the same hereby is vacated; and it is

FURTHER ORDERED that Universal Oil Products Company appear and show cause, if any there be, why the said judgment of this court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf; and it is

FURTHER ORDERED that the rule to show cause embodied in the preceding paragraph be made returnable on October 13, 1947; and it is

FURTHER ORDERED that the Attorney General of the United States, or some member of the staff of the Department of Justice designated by the Attorney General, be and he hereby is authorized to appear as *amicus curiae*.

By the Court

BIGGS
United States Circuit Judge

Order dated June 20, 1947

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5648 October Term 1934

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

ORDER

Present: BIGGS, MARIS, GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

AND NOW, to wit, this 20th day of June, 1947, it is

ORDERED that the intervention of Skelly Oil Company, as prayed for by it, be and the same hereby is authorized and allowed; and it is

FURTHER ORDERED that the order of this court of June 15, 1944, setting aside and vacating the judgment of this

court entered on June 26, 1935 be and the same hereby is vacated; and it is

FURTHER ORDERED that Universal Oil Products Company appear and show cause, if any there be, why the said judgment of this court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf; and it is

FURTHER ORDERED that the rule to show cause embodied in the preceding paragraph be made returnable on October 13, 1947; and it is

FURTHER ORDERED that the Attorney General of the United States, or some member of the staff of the Department of Justice designated by the Attorney General, be and he hereby is authorized to appear as *amicus curiae*.

By the Court

BIGGS
United States Circuit Judge.

Withdrawal of Appearances of *Amici Curiae*

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

ROOT REFINING COMPANY, Defendant-Appellant vs. UNIVERSAL OIL PRODUCTS COMPANY Plaintiff-Appellee	No. 5546 and No. 5648

WITHDRAWAL OF APPEARANCES AS *AMICI CURIAE* OF J. BERNHARD THIESS AND THORLEY VON HOLST

The undersigned, appointed *amici curiae* by order of this Court on November 18, 1941, respectfully show unto this Honorable Court that Universal Oil Products Company has paid to them as *amici curiae* the amount allowed to them by the order of this Court of December 29, 1944, for the fees and expenses of the Special Master, Thomas Raeburn White, and that by authority of the order of this Court of June 20, 1947, the United States of America has entered its appearance herein as *amicus curiae,* and hence that further proceedings in said capacity will be conducted by the representatives of the United States.

Accordingly, the undersigned, this Honorable Court consenting, hereby withdraw their appearances as *amici curiae* in the above entitled causes.

(Sgd) J. BERNHARD THIESS

(Sgd) THORLEY VON HOLST

Approved:

BIGGS, *J.*, July 30, 1947
For the United States Court of Appeals
For the Third Circuit.

Appearance of the United States of America as *Amicus Curiae* in No. 5546

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5546 OCTOBER TERM, 1934

ROOT REFINING COMPANY,
Defendant-Appellant

vs.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

APPEARANCES OF ATTORNEYS FOR THE UNITED STATES OF AMERICA, *AMICUS CURIAE*

The Clerk will enter our appearances for the United States of America as *amicus curiae* in the above-entitled cause.

/s/ PEYTON FORD
Peyton Ford
Assistant Attorney General

/s/ ROY C. HACKLEY, JR.
Roy C. Hackley, Jr.
Special Assistant to the
Attorney General

/s/ ALFRED C. AURICH
Alfred C. Aurich
Special Assistant to the
Attorney General

Department of Justice
Washington 25, D. C.

Appearance of the United States of America as *Amicus Curiae* in No. 5648

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 5648 OCTOBER TERM, 1934

ROOT REFINING COMPANY,
Defendant-Appellant

vs.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

APPEARANCES OF ATTORNEYS FOR THE UNITED STATES OF AMERICA, *AMICUS CURIAE*

The Clerk will enter our appearances for the United States of America as *amicus curiae* in the above-entitled cause.

/s/ PEYTON FORD
Peyton Ford
Assistant Attorney General

/s/ ROY C. HACKLEY, JR.
Roy C. Hackley, Jr.
Special Assistant to the
Attorney General

/s/ ALFRED C. AURICH
Alfred C. Aurich
Special Assistant to the
Attorney General

Department of Justice
Washington, D. C.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 102 Misc.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY AND SKELLY OIL COMPANY.

MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE
and
MEMORANDUM.

LESLIE NICHOLS,
1759 Union Commerce Bldg.,
Cleveland 14, Ohio.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 9647

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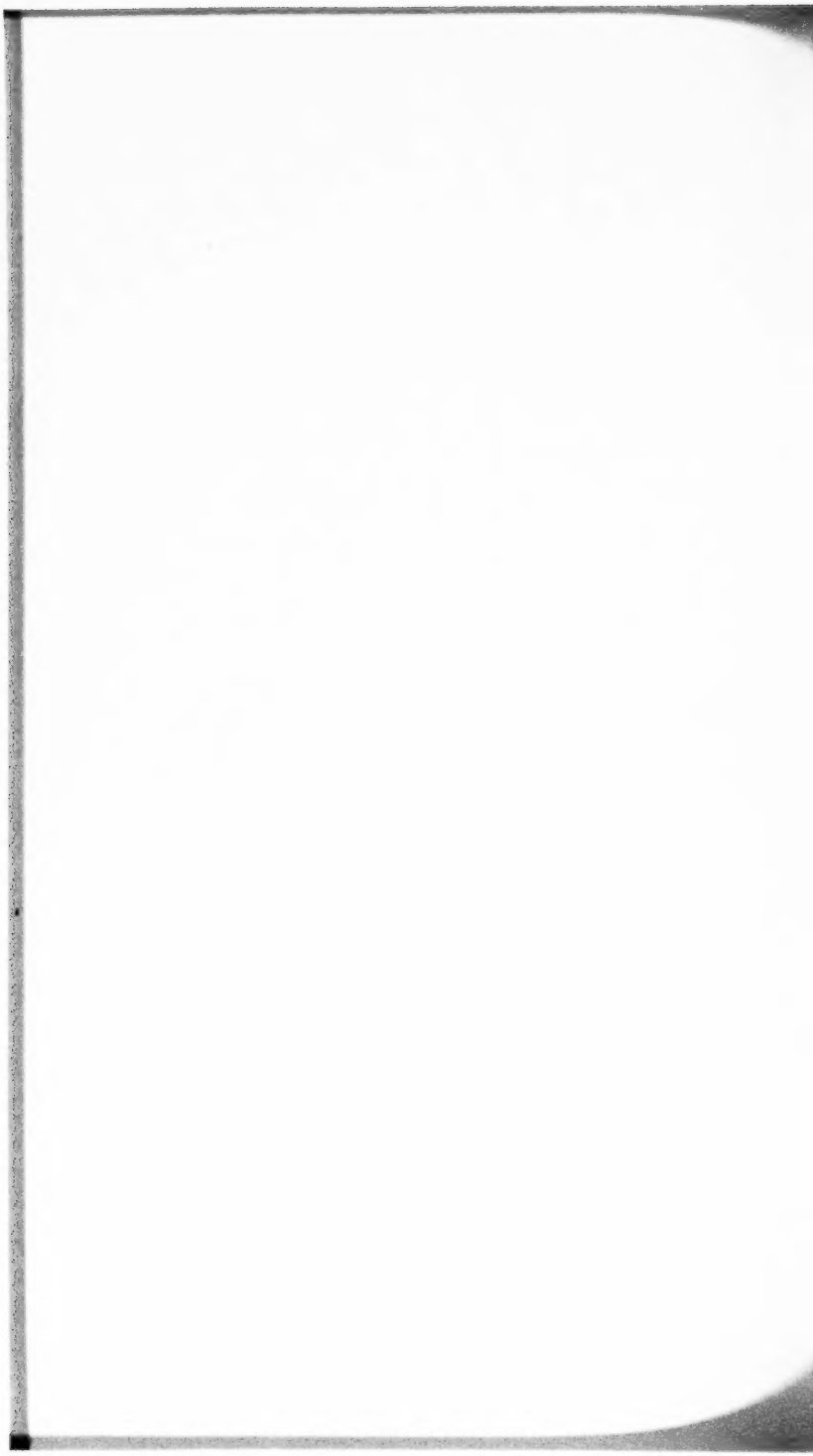

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 102 Misc.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY AND SKELLY OIL COMPANY.

MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE.

LESLIE NICHOLS hereby respectfully requests permission of the Court to file, as amicus curiae and in connection with these proceedings, the attached memorandum.

LESLIE NICHOLS,
1759 Union Commerce Building,
Cleveland 14, Ohio.

MEMORANDUM OF AMICUS CURIAE.

STATEMENT.

These proceedings having come to the attention of amicus curiae, he has felt his duty to this Court impels him to place before it certain matters within his knowledge which bear heavily upon the existence of a controversy with adversary parties. It is observed that the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit is challenged largely upon the ground that there were not before it "adverse parties asserting adverse legally cognizable interests." But it does not follow that there are not parties who, while not formally of record, yet are in legal effect parties to the entire proceeding and whose interests are strictly adversary.

It is the purpose of this memorandum to acquaint the Court with the fact that there is at least one other party whose rights will be materially affected and whose application for formal intervention was stayed by these proceedings.

During the times hereinafter mentioned The National Refining Company (now named William Whitman Company, Inc.), an Ohio corporation, maintained refining plants at Findlay, Ohio, and at Coffeyville, Kansas, and was engaged in the business of producing, refining and selling petroleum products, chief among them gasoline. In the years 1930 and 1931 National installed and adopted in both plants the so-called and unpatented Winkler-Koch process for cracking petroleum and refining gasoline. The Winkler-Koch process was widely used by refining companies, including Root Refining Company, Defendant Appellant in this case.

Universal Oil Products Company is a patent holding company, its stockholders during the times hereinafter mentioned being several very large oil companies, among them Standard Oil Company of California, Atlantic Refining Company and Shell Union Oil Corporation. Substan-

tially its only business was the granting to or forcing of patent licenses upon lesser members of the industry and during the 1930's and early 1940's thereby received millions of dollars of royalties. Universal had filed a score or more infringement actions, many of them directed against users of the said Winkler-Koch process.

In order to meet the extensive resources of Universal which were available for its aggressive program, substantially all of the users of the Winkler-Koch process united to form a so-called Winkler-Koch Patent Company for defense purposes. That Company was authorized to provide defense counsel for its members and was financially supported by funds contributed by its members, determined by the volume of their products. The Winkler-Koch Patent Company selected and paid counsel who defended Root in the case of *Universal Oil Products Company vs. Root Refining Company*, which is the case now before this Court.

After dismissing without prejudice an earlier case against National, Universal instituted a suit in 1935 in the United States District Court in and for the Second Division, District of Kansas, being No. 960-N In Equity on the docket of said court, and entitled *Unversal Oil Products Company vs. National Refining Company*. In the complaint Universal alleged the infringement by National (by its use of the Winkler-Koch process) of several of Universal's patents, later by stipulation reduced to the so-called Egloff patent No. 1,537,593, and the Dubbs patent No. 1,392,629, and being the same patents in litigation in the said *Root* case. To said complaint National filed answer pleading invalidity of the patents and non-infringement thereof by it.

After the decision by the United States Court of Appeals for the Third Circuit in June 1935 in *Universal Oil Products Company vs. Root Refining Company*, 78 F. 2d 991 (opinion written by Judge Davis), affirming the decree of the District Court (6 F. Supp. 763), which had upheld the

validity of the said Dubbs and Egloff patents and the infringement thereof by Root's operations (the Winkler-Koch process), Universal, on March 13, 1937, filed in the Kansas case against National an Amendment to Bill of Complaint.

In said Amendment Universal set out the above suits against Root Refining Company charging infringement of the Egloff and Dubbs patents (Nos. 1,537,593 and 1,392,629 respectively); that in 1934 the United States District Court for the District of Delaware entered decree in favor of Universal and against Root Refining Company; that from said decrees Root perfected an appeal to the Circuit Court of Appeals for the Third Circuit which on June 26, 1935 affirmed the decrees of the United States District Court for the District of Delaware in all respects in an opinion reported in 78 F. 2d 991; that thereafter a petition for rehearing was filed and denied and that a petition for writ of certiorari was filed in the United States Supreme Court and by it denied on or about October 1, 1935; that on October 30, 1935 the mandates of the Circuit Court of Appeals for the Third Circuit to the District Court in conformity with its judgments aforesaid, were handed down.

In said Amendment it was further averred that prior to the trial of Universal's suits against Root there were meetings of oil refiners using or contemplating the use of apparatus and process for cracking of oil within the purview of one or both of the patents declared upon and that the defendant was present or represented at said meetings; that said refiners, including National, selected counsel to control and conduct such suit or suits as might be prosecuted under said patents against any of them for the infringement thereof and agreed to contribute money for the defense of such suit or suits in accordance with the plan agreed upon; that National did participate in the selection of counsel or did agree to or confirm the selection which was made and did contribute to a defense fund; that the counsel so selected did have full control of the defenses which were

made in the case of *Universal Oil Products Company vs. Root Refining Company* and that the fund so created was drawn upon to defray the expenses incurred in said defense, including counsel fees. Universal in said Amendment averred that for carrying out the purposes agreed upon at said meetings there was created an organization or voluntary association known as Winkler-Koch Patent Company, for collecting the contributions to be made as aforesaid and for dispensing them and for generally carrying out the purposes of the agreement of the refiners represented thereby in connection with the defense of any suit or suits which might be or which had been brought for patent infringement, including the patents in suit; that National agreed and consented to such procedure and had an interest in said organization, Winkler-Koch Patent Company and that the latter stood in the position of its agent; that said organization did itself and through attorneys of its selection and the selection of the companies which it represented, including National, conduct and control the defenses which were made in said *Universal Oil Products Company vs. Root Refining* suits aforesaid; that said organization is now and through the same attorneys controlling and conducting the defense which is being made in this case (the Kansas case against National).

Finally, in said Amendment Universal averred that the decree entered as aforesaid in said cases of *Universal Oil Products Company vs. Root Refining Company*, and all questions which were or might have been raised on behalf of National in said suits is or are now *res adjudicata*.

National was represented in said Kansas suit by counsel selected by the Winkler-Koch Patent Company, the same counsel which defended Root in the cases of *Universal Oil Products Company vs. Root Refining Company*. Said counsel filed on behalf of National an answer to said Amendment to Bill of Complaint in which National admitted that it held meetings with other oil refiners with the sole object of making arrangements for defraying the

cost and expenses of patent litigation arising out of the use by said oil refiners of the Winkler-Koch process; admitted that it contributed money to defray the expenses of the said litigation, including the defense of said case of *Universal Oil Products Company vs. Root Refining Company*; but National denied that the decrees entered in the cases of *Universal Oil Products Company vs. Root Refining Company* and all questions which were or might have been raised on behalf of National were *res adjudicata*.

Though its answer denied the legal effect of the averments of the Amendment to Bill of Complaint and its admissions thereto made, nevertheless National, upon the advice of counsel, was constrained to abandon further contest by reason of the *res adjudicata* plea and to capitulate and accept from Universal a license agreement. Within a month following the filing of said Amendment to Bill of Complaint there followed negotiations for a license agreement during the course of which Universal's officers repeatedly alluded to the judgments it had procured in the *Root* case. The negotiations resulted in National accepting a license agreement from Universal as of April 1, 1937, and since then National has paid or incurred liability for royalties in the amount of approximately one million dollars.

On June 15, 1944, the Third Circuit Court of Appeals ordered that its judgments entered in this case on June 26, 1935 be vacated and that the mandates which were issued on October 30, 1935 be recalled and the cases restored to the argument list for reargument. From that date National withheld the payment of royalties accruing under the said patent license agreement.

Following the decision of this Court on June 10, 1946, in *Universal Oil Products Company vs. Root Refining Company* (328 U. S. 575), National filed in the District Court of the United States for the District of Delaware, Civil No. 987 on the docket of said court, a complaint entitled

"*William Whitman Company, Inc. (formerly The National Refining Company), Plaintiff, vs. Universal Oil Products Company, Defendant.*" In said complaint National recited most of the facts hereinabove contained and also set forth the proceedings in the United States Circuit Court of Appeals for the Third Circuit which had been instituted upon the application of *amici curiae* in June 1941, and which resulted in the appointment of a Master with authority to investigate and make report to that Court his findings and conclusions concerning the relationship and dealings between Universal, Morgan S. Kaufman and J. Warren Davis, and in particular whether there was in connection with the prosecution and disposition of such causes such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by the said Circuit Court of Appeals in the *Root* case on June 26, 1935. Said complaint further recited the report of said Master and his findings that the judgment of the Court of Appeals for the Third Circuit in the *Root* case was tainted with fraud and corruption and was invalid; that the said Court of Appeals thereupon issued its order accepting the Master's report and vacating its judgment entered on June 26, 1935, and recalling its mandate issued October 30, 1935. National averred in said complaint that in the manner and by the means so found by the Master and accepted by the Third Circuit, the judgment of the United States Circuit Court of Appeals had been found to have been procured by the fraud of Universal; that Universal, in its subsequent conduct with respect to National, had concealed with fraudulent intent its action and the action of its agents and attorneys in the corruption of a member of said Court of Appeals which resulted ultimately in the subsequent vacation of the judgment. National prayed for a decree of the Delaware District Court cancelling and rescinding the license agreement entered into between the parties as of April 1, 1937 and for restitution. Said action

in the Delaware District Court is now pending upon the motion of Universal, defendant therein, to strike from the complaint all recitals relating to the action of the Third Circuit Court of Appeals upon the issue of corruption.

It has come to the knowledge of *amicus curiae* that there was in course of preparation a motion by National directed to the United States Circuit Court of Appeals for the Third Circuit for leave to intervene as a party of record in this case and that such motion was to have been filed on October 13, 1947 (which was the return day set by said court in its order of June 20, 1947, by which, among other things, it directed Universal to show cause why the judgments of that court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon the said court); that the filing of said motion was interrupted and suspended by the institution of the proceedings now before this Court.

DISCUSSION.

The very briefest summarization is all that will be appropriate under the present circumstances. The primary objective of *amicus curiae* has been to place before the Court by this memorandum the fact that there *is* a genuine controversy with adversary parties "in legal effect" and that it was only the institution of these proceedings which interrupted the intervention of such parties "of record."

The petitioner, Universal Oil Products Company, has suggested to this Court that "none of the other oil companies sued in other courts by petitioner for infringement of the same patents could have a further interest"; that "the cases in which pleas of *res adjudicata* had been set up by petitioner against the other oil companies had all been dismissed"; that "the patents involved no longer had any materiality to any one since the Dubbs patent had expired in 1938 and the Egloff patent had been held in-

valid by this Court." Universal represents to this Court that no one is interested in the future of this case since Universal itself cancelled out Root by "settling" with it—the very month following that in which the Third Circuit Court of Appeals vacated its judgments because of Universal's corruption in an agreement which provided, *inter alia,* that the decree of the Delaware District Court in this case be vacated, that the complaints filed therein be dismissed and that either party might cause an order to be entered or do any other necessary or advisable thing to effectuate the foregoing without further notice to the other.

But in making those representations to this Court, as well as in failing to "cancel out" others who, Universal itself avers, were parties to the controversy in legal effect, petitioner has made an error. *Amicus curiae* is informed that National is interested, that it intends to become a party of record as well as in legal effect and that it will supply the real controversy which petitioner complains has been missing. The history of the litigation recited in the foregoing statement shows this Court the procedure by which Universal *has* profited by its judgment obtained from the Third Circuit Court of Appeals and also shows the procedure by which it *hopes* to retain the profits. *If* it did obtain the judgment in the infamous manner which has been charged, it certainly reaped the benefit thereof by its subsequent conduct toward National. It charged that by reason of facts which National was forced to admit, National was *legally estopped* from further defenses against the Dubbs and Egloff patents because National was in legal effect *a real party* in the *Root* case and was bound by the judgment of the Third Circuit Court of Appeals therein. Whether or not National's counsel was right in surrendering to that charge (and that counsel was right was actually so held by the District Court for the Northern District of Illinois in a similar *res adjucata* plea in the case of *Universal Oil Products Company vs.*

Winkler-Koch Engineering Company, 27 F. Supp. 161 (1939)), Universal nevertheless achieved its objective to force payment of tribute to the patents. Even in the Delaware case now pending wherein National prays for rescission of the license agreement because the Third Circuit Court of Appeals vacated its 1935 judgment upon the ground of Universal's fraud, Universal has filed a motion to strike the allegations from the complaint and on the very ground that National was not a party to the proceedings in the *Root* case. It would appear that when it is to Universal's advantage to plead that National was a party, it does so; but when of greater advantage to plead that National was not a party, it does that. But the license to National was procured, and royalty paid thereunder, on Universal's charge that National *was* a party.

Amicus curiae suggests to this Court that the petitioner, having used its judgment to its great profit, now seeks to insulate itself from retribution by pleading that "there is no controversy." It is respectfully suggested that the interests of justice would be well preserved if this Court, whatever may be its decision, affords opportunity for parties "in legal effect" to become actual parties of record and thus complete such controversy as will afford the lower court unquestionable jurisdiction for its contemplated procedure.

Respectfully submitted,

LESLIE NICHOLS.

Copies of this Motion and Memorandum have been delivered to all counsel of record.

LESLIE NICHOLS.